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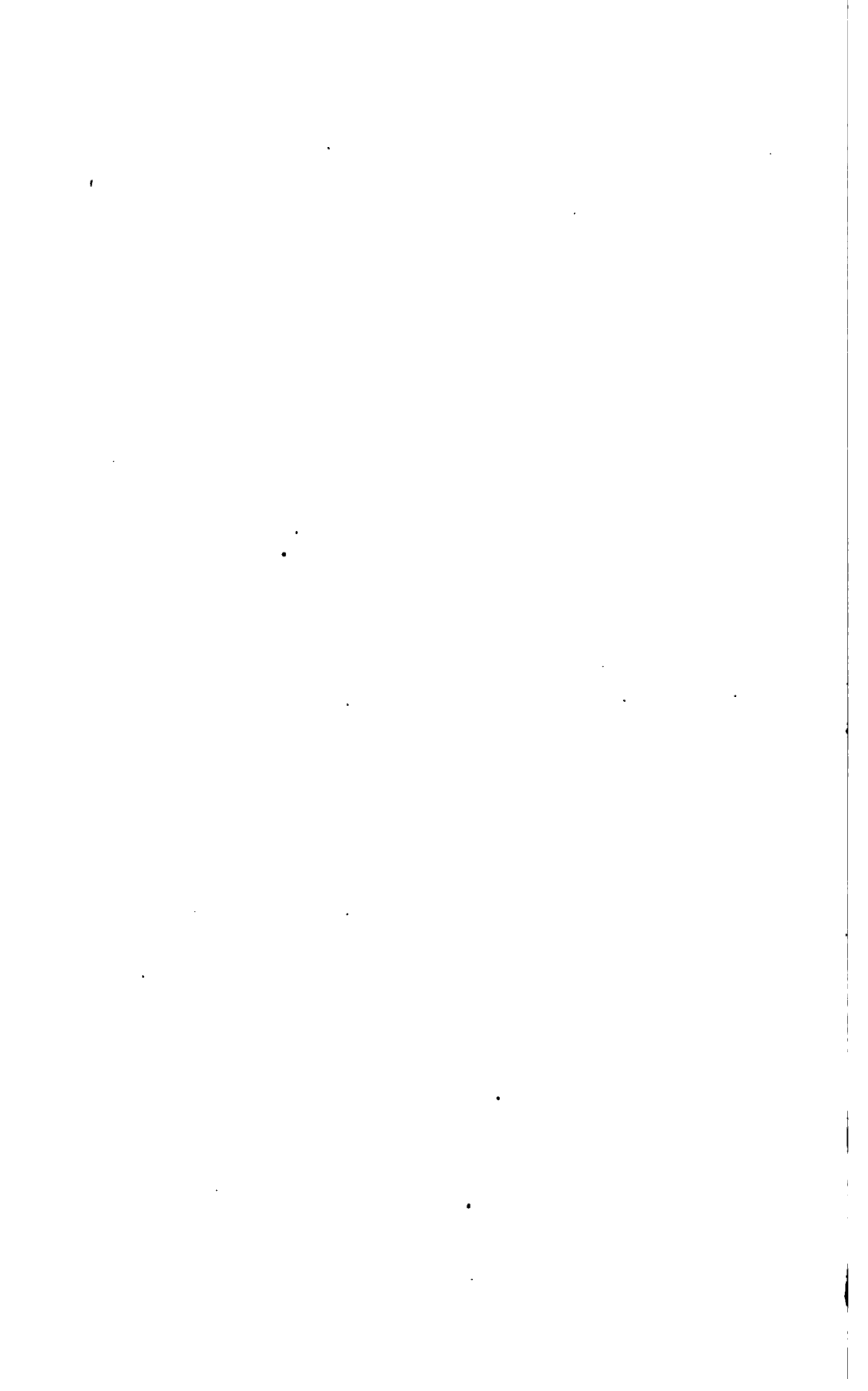
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THE
HOUSE OF LORDS CASES

ON
APPEALS AND WRITS OF ERROR,
CLAIMS OF PEERAGE, AND DIVORCES,
DURING THE SESSIONS
1848, 1849, AND 1850.

BY CHARLES CLARK AND W. FINNELLY,
BARRISTERS AT LAW.

BY APPOINTMENT OF THE HOUSE OF LORDS.

VOL. II.

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DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS
VOLUME.

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• MEMORANDA.

IN the Vacation between Hilary and Easter Terms, 1850, the Right Honourable Lord Denman, Lord Chief Justice of England, retired from the Bench, and the Right Honourable Lord Campbell was appointed in his stead.

IN Easter Term, 1850, the Right Honourable Lord Cottenham resigned the Great Seal, and was about the same time created an Earl. The Right Honourable Lord Langdale, the Master of the Rolls, the Right Honourable Sir Lancelot Shadwell, Vice-Chancellor of England, and the Honourable Sir Robert Monsey Rolfe, one of the Barons of the Court of Exchequer, were appointed Commissioners of the Great Seal.

IN the Vacation after the following Trinity Term, the Right Honourable Sir T. Wilde, Lord Chief Justice of the Court of Common Pleas, resigned that office, and was appointed Lord High Chancellor, on which occasion he was created a Peer, by the title of Baron Truro. He was succeeded in the office of Lord Chief Justice by Sir John Jervis, her Majesty's Attorney-General, who was at the same time sworn of her Majesty's most Honourable Privy Council. Sir John Romilly, the Solicitor-General, was appointed Attorney-General, and Alexander James Edward Cockburn, Esq., was made Solicitor-General, and was afterwards knighted.

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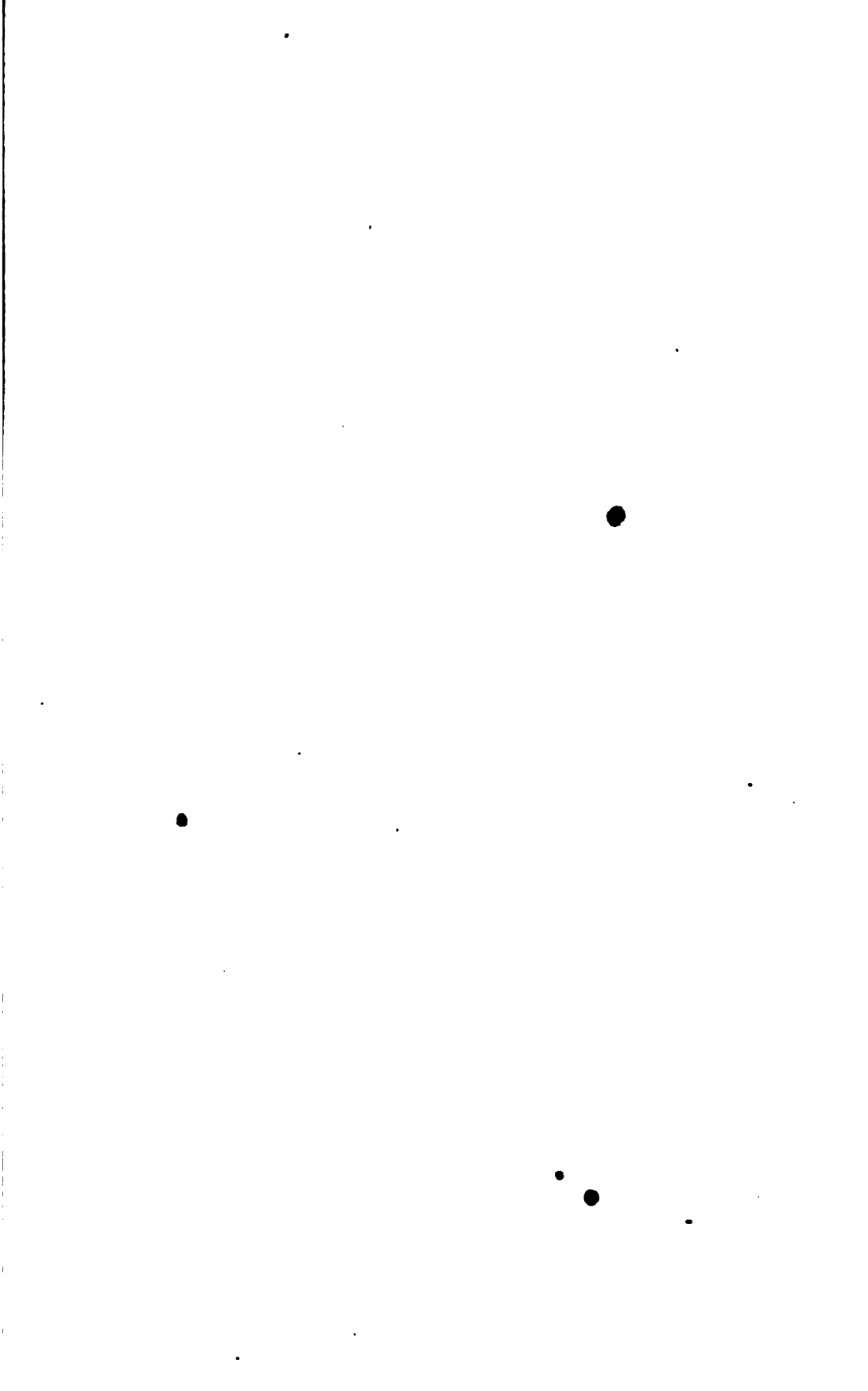


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CASES

IN THE

HOUSE OF LORDS.

THE DUKE OF BRUNSWICK v. THE KING OF HANOVER.

1848. July 25, 27, 31.

CHARLES FREDERICK AUGUSTUS WILLIAM, Duke of Brunswick,	}	<i>Appellant.</i>
ERNEST AUGUSTUS, King of Hanover, Duke of Cumberland and Teviotdale, in Great Britain, and Earl of Armagh, in Ireland,	}	<i>Respondent.</i>

Foreign Sovereigns. Affairs of State. Jurisdiction.

A foreign sovereign, coming to England, cannot be made responsible in the Courts there for acts done by him in his sovereign character, in his own country: —

Held, therefore, that the King of Hanover, who was also a British subject, and was in England exercising his rights as such subject, could not be made to account in the Court of Chancery for acts of state done by him in Hanover and elsewhere abroad, in virtue of his authority as a sovereign, and not as a British subject.¹

THIS was an appeal against an order of the Master of the Rolls, allowing a demurrer to the appellant's bill for want of equity, and also for want of jurisdiction.²

* The bill, filed in August, 1843, stated that in 1830 the * 2 appellant was the reigning Duke of Brunswick, and was, in his private capacity, seised and possessed of real and personal estates of considerable value in Brunswick, England, Hanover,

¹ See *Mayor of London v. Cox*, Law Rep. 2 H. L. 245.

² 6 Beavan, 1; 13 Law Journal N. S. Chanc. 107.

France, and elsewhere ; but that on the 6th of September, 1830, during his absence from Brunswick, a revolutionary movement took place there, in the course of which the government was overthrown, and he was prevented from returning to resume his authority as reigning Duke : that pending the said movement, a decree of the Germanic Diet of Confederation was passed, dated the 2d of December, 1830, whereby the appellant's brother, William, Duke of Brunswick, was invited to take upon himself, provisionally, the government of the Duchy, and the Diet left it to the legitimate *agnati* of the appellant to provide for the future government thereof : that his late Majesty William the Fourth, as King of Hanover, was a member of the said Diet, and as such King, he or his Viceroy, the Duke of Cambridge, voted in support of the said decree : that in February, 1831, his said late Majesty, and the said William, Duke of Brunswick, claiming to be the legitimate *agnati* of the appellant, caused to be published a declaration, purporting to depose him from the throne of the said Duchy, and declaring that the same had passed to William, Duke of Brunswick, who, in pursuance of such declaration, had ever since exercised the rights and authorities of Sovereign Duke of Brunswick.

The bill further stated that in 1833 an instrument in writing, signed by his Majesty William the Fourth, and William, Duke of Brunswick, and dated at St. James's the 6th of February, and at Brunswick the 14th of March, 1833, was promulgated by them in the German language, which, being translated, was as follows : " We, William the Fourth, King of, &c. and of Hanover, Duke of Brunswick and of Luneburg, and we, William, Duke of Brunswick and of Luneburg, moved by the interests of our house, whose well-being is confided to us, and yielding to a painful but inevitable necessity, have thought it necessary to consider what measures the interests of his Highness Charles, Duke of Brunswick, the preservation of the fortune now in his hands, the dangers and illegality of the enterprizes pursued by him, and lastly, the honour and dignity of our house, may require ; and after having heard the advice of a commission charged by us with the examination into this affair, and after having weighed and exactly balanced all points of fact and law ; and whereas, after the dissolution of the German empire, the powers of supreme guardianship over the Princes of the empire, which up to that period had appertained to the Emperor, devolved to the heads of sover-

eign states ; we, taking into consideration the laws and customs, and by virtue of the rights unto us belonging, in quality of heads of the two branches of our House, have decreed as follows : —

“ Article the first. — Certain facts, either notorious or sufficiently proved, have caused us to arrive at the conviction that his Highness Duke Charles is at this time wasting the fortune which he possesses in enterprizes alike impossible and dangerous to * himself and other persons, and is seeking to damage the * 4 just claims which certain persons interested now or hereafter may legally have in his property, we have consequently considered that the only method of preserving the fortune of his Highness Duke Charles from total ruin, is to appoint a guardian over him.

“ Article the second. — In consequence of this conviction, we decree that Charles, Duke of Brunswick, shall be deprived of the management and administration of his fortune ; a guardian shall be appointed whom we shall choose by mutual consent from amongst the noble scions of our house, although the right of choice belongs to the legitimate sovereign of the Duchy of Brunswick in virtue of his title alone.”

By the third, fourth, and fifth articles, the guardianship was confided to the Duke of Cambridge, then Viceroy of Hanover, and he was authorised to appoint sub-guardians for the management of the property, who should make an inventory thereof, and take measures for the preservation and administration of the fortune placed under the guardianship of his Royal Highness, to whom they should render an annual account of their management, to be by him transmitted to William the Fourth and the Duke of Brunswick for settlement and approval.

By article the sixth the guardianship was to be “ considered as legally established at Brunswick, where it was to have its locality.” And by article the seventh the decree was to be published in the bulletins of the laws of the kingdom in the usual form, &c.

At the foot of this instrument was added a note, signed by the respondent, then Duke of Cumberland, * and by the * 5 Dukes of Sussex and Cambridge, approving of the arrangement.

The bill then stated that the said instrument was void, but nevertheless the Duke of Cambridge accepted the appointment of supreme guardian of the appellant's property, and entered into possession thereof to a very considerable amount ; and after sev-

eral payments, properly made, there remained in his hands a large surplus for which he never accounted to the appellant: that on the death of William the Fourth, in June, 1837, the respondent became King of Hanover, and thereupon by some instrument in writing, the particulars of which he refused to disclose, but which was signed by him and William, Duke of Brunswick, the respondent was purported to be appointed guardian of the appellant in place of the Duke of Cambridge, under the instrument of the 6th of February and 14th of March, 1833, and with all the powers and authorities thereby purported to be conferred on the Duke of Cambridge: that shortly after such appointment the Duke of Cambridge accounted to the respondent for all the real and personal estates of the appellant, possessed by him or his agents, and paid the balance due from him in respect thereof to the officers of the treasury of Hanover, whereby the same came to the hands of the respondent, and he, upon his appointment as guardian, entered into, and ever since continued, by himself or his agents, in the possession or receipt of the rents and profits of the real estates belonging to the appellant in his private capacity at Brunswick, and also from time to time took possession of further parts of the appellant's personal property in Brunswick and elsewhere, and

* 6 sold and converted * into money parts thereof, which did not consist of money, and possessed himself of the produce of such sale, and from time to time made divers payments on account of the appellant and of the expenses incurred in the management of his property; but after allowing for such payments, there remained a large balance, to the amount of several hundred thousand pounds, due from the respondent, and he never rendered to the appellant any account of the property so possessed by him.

The bill further stated that the respondent, until within a few weeks, had been residing in Hanover, out of the jurisdiction; that the appellant had by himself and agents applied to him to account for the rents and profits of the real estates, and for the personal estate and effects, and produce of the sale thereof, &c., with which applications the respondent refused to comply on various pretences suggested in the bill,—as that the said instrument of 1833, and the subsequent instrument, under which the respondent was appointed guardian, were valid and legal, and that he was not liable to account for the acts and receipts of himself and his agents, or of the Duke of Cambridge and his agents, otherwise than to Wil-

liam, Duke of Brunswick; but the bill charged the said instruments to be invalid according to the laws as well of Brunswick and Hanover as of Great Britain, however that the Duke of Cambridge and the respondent respectively took possession of the appellant's real and personal estates, as aforesaid, under colour of the said appointments as guardians and trustees for the appellant, and not adversely; and that the appellant and the respondent, both then residing in * England, were subjects of the Crown * 7 of Great Britain and Ireland, and that by the law of England such appointments of the Duke of Cambridge and of the respondent to be guardians of the appellant, and all the rights purported to be given to them respectively, were void, even if the same were valid by the law of Brunswick, and that if the said appointments were valid at the time they were made — which the appellant denied — there was then nothing in the circumstances, or conduct, or state of mind of the appellant to debar him from the full enjoyment of his property; and he charged, that in the circumstances aforesaid, the respondent was liable to account to him for the receipts and payments, acts, neglects, and defaults of himself and his agents, under his alleged appointment of guardian as aforesaid.

The bill, after charging in detail divers acts and dealings by the Duke of Cambridge and the respondent, and their respective agents, with the appellant's private property of various kinds, also charged, that in 1833–4, the appellant, then residing in Paris, and possessed of other property of large amount, the Duke of Cambridge, as guardian, acting by himself and agents, under colour of said appointment caused proceedings to be taken and attachments to be issued against the appellant and several persons in France, who had in their possession money, goods, and other effects of the appellant. The bill stated a long course of litigation arising out of those proceedings in France, resulting in 1837 in a final decree awarding damages and costs to a large amount against the Duke of Cambridge, in respect of which the appellant received 100,000 francs in Paris, and for the unsatisfied balance, * amounting to 1775*l.*, he, in 1838, brought an action * 8 against the Duke in Her Majesty's Court of Common Pleas, to which the Duke of Cambridge, after putting in several dilatory pleas, at last submitted in 1840, and paid 2000*l.* in satisfaction of the debt and costs. And the bill charged that the said 2000*l.* and

100,000 francs were paid out of the personal estate, or the rents of the real estates, of the appellant, possessed and received by the Duke of Cambridge or his agents, or by the respondent or his agents, under the said instrument of 1833.

The bill also charged that the appellant proceeded to the town of Osterode, in the kingdom of Hanover, in 1830, accompanied by a small retinue, with the intention of making a peaceable entry into his own dominions, and that while staying at the hotel there, he was attacked by a party of armed men, and compelled to escape into Prussia, leaving behind him cash and notes to the amount of 24,000 crowns, or 4500*l.* sterling, all which came to the hands of the Duke of Cambridge; in evidence of which the bill set forth a letter from the Duke to the appellant, stating, "With respect to the property taken from you at Osterode, I have the satisfaction of being able to inform you that there is every reason to believe it is in perfect safety. I think, however, under actual circumstances, it would not be consistent with my duty to deliver the property into your hands, but I propose to place it at the disposal of the existing government of Brunswick, to whom you can make application, &c." And the bill charged, that the Duke of Cambridge, in resigning the office of guardian, accounted for the said cash and notes to the respondent, as the

* 9 * new guardian, and that the latter was liable to account for the same to the appellant. The bill also charged, that the respondent was a peer of the realm, and his title as such was "Ernest Augustus, Duke of Cumberland and Teviotdale, in Great Britain, and Earl of Armagh, in Ireland," and that since his arrival, and during his then residence in London, he exercised his rights and privileges as such Peer.

The bill prayed that it might be declared that the said instrument of the 6th of February and 14th of March, 1833, and the appointment of the Duke of Cambridge as guardian of the fortune and property of the appellant, thereby purported to be made, and the subsequent appointment of the respondent as such guardian, were absolutely void and of no effect; and that it might be declared that the respondent was liable and ought to account to the appellant for the personal estate, property and effects, and the rents and profits and produce of the sale of the real estates of the appellant, possessed or received by the respondent, or any

person or persons by his order or for his use, &c. since his appointment as guardian, by virtue of the said instrument, including therein the personal estate and effects, rents, profits, and produce paid or accounted for to the respondent by the Duke of Cambridge as aforesaid, &c.

The respondent appeared,¹ and demurred to the bill for want of equity and for want of jurisdiction. The Master of the Rolls allowed the demurrer. The appeal was brought against that decision.

* *Mr. Rolt* and *Mr. Heathfield* for the appellant : —

*10

The respondent's defence to this suit is put on two grounds: first, that, as an independent sovereign he is not liable to be sued in the Courts of this country, and his right of exemption is not affected by the circumstance of his being also a subject of her Majesty; secondly, that the matters complained of in the bill are not the subject of municipal jurisdiction, being either matters of state or political transactions, which cannot be dealt with in our Courts, consistently with principles of public policy; so that the whole of the respondent's case is made to rest upon the political character of himself and of the transactions in question.

The matters stated in the bill, and which are, or at least must be taken upon the demurrers to be, admitted by the respondent, are transactions of a private nature as between one subject of her Majesty and another, for the bill does not complain of any act done in respect of the appellant's sovereignty or Dukedom. The instrument, under colour of which he was deprived of the management of his private property, purported to have for its object to preserve the property, and not to deprive him absolutely of it. The bill alleges that that instrument is invalid according to the law as well of Brunswick and Hanover as of England. That allegation also must be taken to be admitted, but it is capable of proof in due form if necessary. The bill further alleges that the Duke of Cambridge, the first guardian under that instrument, seized and possessed himself of the appellant's property, not adversely, but as guardian —

* [LORD LYNDHURST. — Is the Duke of Cambridge a de- *11
fendant?]

He was not made a party, as the bill stated that he accounted

¹ See 6 Beavan, p. 9, note, and p. 33.

for his management to the respondent, his successor in the guardianship. It is not, however, necessary to discuss that point, as there was no demurrer to the bill for want of parties, nor was any question of that kind raised in the Court below.

The bill further alleges, that the appellant and respondent are both subjects of the Crown of England; that the said instrument, even if valid according to the laws of Brunswick, is invalid according to the law of England, and that there is nothing now in the mind or character of the appellant to show that he is not perfectly competent to manage his property. The demurrer admits all these allegations.

Besides the seizure by the guardians of the appellant's private property within the territory of the Duchy, the bill states that proceedings were taken in 1834 by the Duke of Cambridge, as such guardian, against the appellant, then residing in France, and against various persons there who held money or effects belonging to him. The result of that long and expensive litigation was a decree for the appellant, with costs against the Duke. The bill states, and the statement cannot be denied, that these costs, as well as another sum of 2000*l.*, for which a suit brought in the English Court of Common Pleas was compromised, were paid out of the appellant's own property in the hands of the respondent. The bill also states, that in a criminal attack, made by an armed party on

the appellant in the Hanoverian town of Osterode, in 1830,
 *12 he was deprived of 24,000 crowns, * equal to 4500*l.* sterling, besides his carriage and some jewels; and there is set forth as evidence of that statement, a letter from the Duke of Cambridge, in effect admitting that the money and other property came to his hands, and that he thought it his duty to place them at the disposal of the then existing government of Brunswick. All these statements amount to this clear and admitted fact, that the Duke of Cambridge first, and the respondent afterwards, took possession of the appellant's property of various kinds at divers times and places, — acting as guardians throughout, although under an invalid instrument, — and he, according to the course of the Court of Chancery, asks for an account. If these transactions had taken place between private individuals, there could be no doubt whatsoever of the appellant's right to such account. But it is objected that the matters complained of, being matters of state transacted abroad, cannot be the subject of municipal jurisdiction here. That

defence has been long exploded ; it was the same that was set up against inquiry into the levying of ship money and the issuing of general warrants, and, if it were to prevail, would lead to an intolerable state of tyranny. The principle of our Courts is, that whenever any person, subject to their jurisdiction, whether sovereign or not, acts without authority or exceeds it, he is liable to account ; *Nabob of the Carnatic v. East India Company*,¹ *Mostyn v. Fabrigas*,² *Frewen v. Lewis*,³ *Attorney-General v. Forbes*,⁴ *Ellis v. Lord Grey*.⁵

* The second defence to the bill is, that the respondent is, *13 by his character of foreign independent sovereign, placed above the jurisdiction of the Court. The appellant, though also a foreign Prince, is by the Act of 4 Anne, c. 4, to be taken to be a natural-born subject of this realm, as a descendant of the Princess Sophia of Hanover. The respondent also, though an independent sovereign, is a subject of her Majesty, being a Peer of the realm, and was actually exercising his privileges as such at the time the bill was filed, so that both parties maintain the character of subjects of the realm as much as any other suitors of the Court. The question then is, whether there is any thing in the character of the instrument by which the King of these realms and a foreign sovereign Prince could authorise a third person, a subject of this realm, to take possession of the property of the appellant, and retain it without accounting ? It is quite clear that the sovereign of this country has no power by law to authorise any person in this country to seize and retain, without account, the property of another. Do the laws of Brunswick or Hanover confer such authority ? The bill charges in effect, that they do not, but the demurrer implies that they do, for after stating in the usual way that there is no equity in the case made by the appellant, it adds, in a very unusual form, that the Court has no jurisdiction as to any of the matters stated in the bill.

The respondent, before putting in the demurrer, adopted the ordinary course of moving the Court to discharge the process, as in *Viveash v. Becker*,⁶ * *Davidson v. The Marchioness of Hastings*,⁷ and *Kinder v. Forbes* ;⁸ but Lord Lyndhurst

¹ 1 Ves. Jun. 371.

² Cowper, 161.

³ 4 Mylne & Craig, at pp. 254, 255.

⁴ 2 Mylne & Craig, 123.

⁵ 6 Simons, 214.

⁶ 3 Maule & Selwyn, 284.

⁷ 2 Keen, 509.

⁸ 2 Beavan, 503.

refused the application, observing that "the defendant is a Peer of the realm, has taken the oath of allegiance to the Sovereign, and has a seat in the House of Peers, and at present is resident here."¹ That was an adjudication of the entire question of jurisdiction which was actually exercised in that order; it is, literally, *res judicata*.

But if the question was not then determined and disposed of, the *onus* lies on the respondent to establish his immunity. There is no case or authority showing that a foreign sovereign residing within the realm, is not subject to the jurisdiction of our Courts. The Master of the Rolls, in his judgment, referred to a passage in Bynkershoek, Tom. 2, "*De foro legatorum*," cap. 3, but not to cap. 4, "*Principis bona in alterius imperio, &c.*," in which is given a clear opinion, applicable to the present question. Any person who claims exemption from the jurisdiction must show the grounds of exemption. Ambassadors are declared exempt (7 Anne, c. 12), because perfect freedom is necessary to the exercise of their vocation. But an ambassador may, by other means, be brought to account and to render justice to a party complaining, as by an application to his own sovereign and government. That mode of redress is here impossible, because the party is himself the Sovereign, and will not, of course, at home grant the redress which he refuses here, so that there is here, if the defence be upheld, a complete failure of justice. There is no necessity to contend that

* 15 the respondent is liable to * arrest, but no reason can be assigned against permitting process against him up to sequestration. All that is required in this case is that, it being shown that wrong has been done, the respondent should be called on to make reparation. The defence set up in this case, would, if allowed, give the respondent an immunity which is not claimed by the Sovereign of these realms, who, in answer to the subject's complaint, directs right to be done, whereupon the Courts take jurisdiction between the subject and Sovereign, as in the case of *Viscount Canterbury v. The Attorney-General*.²

But though it may be held that an independent foreign sovereign is exempt from the jurisdiction — how to serve him with process would be the difficulty — there is in this case the additional ingredient, that the respondent is also a subject, and was not only in this country, but in the exercise of his privileges as a Peer

¹ 6 Beavan, 9, note.

² 1 Phillips, 306.

when the bill was filed and he was served with process. He might, as a foreign sovereign, sue at law or in equity any subject of the realm. There is no principle of law or reason on which he may not be sued; *Calvin's Case*,¹ *Hullett v. The King of Spain*,² *King of Spain v. Hullett*,³ *Glyn v. Soares and the Queen of Portugal*,⁴ *Queen of Portugal v. Glyn*,⁵ *Melan v. Duke de Fitzjames*,⁶ *Barclay v. Russell*,⁷ *De la Torre v. Bernales*,⁸ *Moodalay v. The * East India Company*,⁹ *Munden v. The Duke of Brun-* *16
wick,¹⁰ Vattel, B. IV. ch. vii. § 108, Bynkershoek, Tom. 2, cap. 4. From these cases and authorities is to be clearly inferred this principle, that if process from our Courts can be enforced against a foreign sovereign, he is liable to the jurisdiction; — so that the authorities, as well as principle, are in favour of the jurisdiction.

Mr. Turner and *Mr. Elmsley* for the respondent, were not heard.¹¹

¹ 7 Rep. 15.

⁶ 1 Bosanquet & Puller, 138.

² 1 Dow & Clark, 169.

⁷ 3 Ves. 424; see p. 431.

³ 1 Clark & Fennelly, 333.

⁸ 1 Hov. Suppl. to Ves. Jun. 149.

⁴ 1 Younge & Collyer, at p. 688.

⁹ 1 Brown C. C. 469; 2 Dickens, 652.

⁵ 7 Clark & Fennelly, 466.

¹⁰ 16 Law Journal N. S. Q. B. 300.

¹¹ The "reasons" annexed to the respondent's printed case, signed by Sir C. Wetherell, Mr. Turner, and Mr. Elmsley, were, —

First, Because the respondent, being an independent sovereign Prince, is not liable to be sued in any Court in this country.

"Second, Because the immunity of the respondent from suit, as an independent sovereign Prince, cannot be affected by his being a subject of her Majesty, in cases in which he is sued in respect of matters not transacted by him as such subject; and although it is stated in the bill that the respondent is a subject of her Majesty, as well as King of Hanover, yet it also appears by the bill, that none of the matters therein set forth, and in respect of which relief is prayed and discovery sought from the respondent, were transacted by him as a subject of her Majesty.

"Third, Because the immunity or exemption of a foreign independent sovereign Prince from being sued in the Courts of this country, cannot be less than that of an ambassador, and ambassadors are exempt from such suit by common and statute law.

"Fourth, because it appears by the bill that the matters therein complained of are not the subject of municipal jurisdiction, being either matters of state or political transactions, which cannot be dealt with in the Courts of this country.

"Fifth, Because the maintenance of this suit is inconsistent with principles of public policy."

(See also the argument in the Rolls, 6 Beavan, p. 10.)

THE LORD CHANCELLOR. — I find that all the noble and learned Lords, who attend on this argument, are clearly of opinion that the judgment of the Master of the Rolls is right. The
 * 17 whole case must depend on the allegations of the * bill, there being no matters out of the bill which can be brought into question, except so far as they are referred to by the bill. After the House has heard the very able arguments that have been adduced in opposition to the judgment of the Master of the Rolls, we are all of opinion that there is no ground for impeaching that judgment.

The whole question seems to me to turn upon this (that is to say, for the purpose of this decision, it has not been otherwise contended at the bar, and if it had been, it is quite clear that the contention could not be maintained), that a foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country ; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign.

* 18 * That is the sole question ; therefore I avoid the question which does not necessarily arise, — how far a foreign Sovereign, coming into this country, is amenable at all. I do not enter upon that question, because it does not necessarily arise upon the proper disposal of the matter now before us, as I am of opinion that, upon the face of this bill, the allegations show that the acts could not have been done, and were not done in any private character, but that they were done, whether right or wrong, in the character of the Sovereign of a foreign state.

My Lords, that must be found upon the face of the bill ; or rather, I should say, the converse ought to be found upon the face of the bill ; because, before you can raise a question how far a foreign Sovereign is answerable for a private transaction in the case of some person complaining of an act done by him as an individual, the Court would require that there should appear clearly upon the face of the bill such a case as gives the Court jurisdiction. The Master

of the Rolls seems to have thought there was a nice balance as to whether the allegations amounted to acts done by virtue of sovereignty abroad, or whether they were merely to be considered as acts done in a private character. He seems to have held that whilst there was any ambiguity upon that subject, the Court could not entertain a bill, which did not distinctly state a matter bringing it within the jurisdiction of the Courts of Equity in this country. Certainly, looking at these pleadings, there does not appear to me to be any ambiguity at all, but that the whole transaction arose from acts done in the exercise of rights of sovereignty, * claimed to be vested in those who were the actors. The * 19 commencement of the bill, the foundation of the whole transaction, in my mind, sufficiently shows that.

There are, in point of fact, but two passages which seem to me to be necessary to be adverted to for the purpose of showing the authority under which the acts complained of are alleged to have taken place. The bill states, "That pending the aforesaid revolutionary movement, and before the same could be subdued, a decree of the Germanic Diet of Confederation was made or passed, bearing date the 2d of September, 1830, whereby your orator's brother, William, Duke of Brunswick, was invited to take upon himself provisionally the government of the said Duchy, and the Diet left it to the legitimate *agnati* of your orator to provide for the future government of the said Duchy.

That, at least, was an act of sovereign state; it was by virtue of a decree of the Germanic Diet. Whether the constitution of Germany authorised it or not, is a question we have no power to interfere with, or to inquire into. There is no allegation that, according to the constitution of Germany, it was not a legal act; but there is upon the face of the bill that which is the foundation of all, namely, the decree of the Germanic Diet, depriving the plaintiff of the sovereignty of the Duchy, and appointing his brother William to take his place, and that the Diet left it to the legitimate *agnati* to provide for the future government of that Duchy.

Then the bill alleges, "That his late Majesty King William the Fourth, as King of Hanover, was a member of the said Germanic Diet of Confederation, and * that his said late Majesty, * 20 as such King of Hanover, or the Duke of Cambridge, as his Viceroy or proxy, voted in support of the said decree.

Then comes the instrument under which the defendant, or his

predecessor, the Duke of Cambridge, acted. That is stated upon the face of the bill ; it is part of the statement, and when you come to consider it, I do not apprehend there can be a doubt upon the face of that instrument — which is the foundation upon which all those transactions have taken place — that it does allege that those acts are acts of persons claiming to have the right so to act by virtue of their sovereign authority. It is stated to have been made between his late Majesty King William the Fourth, and William, Duke of Brunswick. The bill states it : “ We, William the Fourth, by the grace of God, King of the United Kingdom of Great Britain and Ireland, and of Hanover, Duke of Brunswick and of Luneburg, and we, William, by the grace of God, Duke of Brunswick and of Luneburg, make known,” &c.; then it states, “ moved by the interests of our house, whose well-being is confided to us,” &c., “ have thought it necessary to consider what measures the interests (rightly understood) of his Highness Charles, Duke of Brunswick, the preservation of the fortune now in his hands,” &c.; and whereas after the dissolution of the German empire, the powers of supreme guardianship over the princes of the empire, which up to that period had appertained to the Emperor, devolved to the heads of sovereign states.”¹

* 21 Your Lordships will observe that they say the duty * had devolved upon them, and they state how it had devolved upon them, that that right which had originally belonged to the Emperor of Germany had now devolved to them as the heads of sovereign states. As such heads of sovereign states, and by virtue of the law and the constitution to which they refer, they are authorised to give directions for the appointment of a guardian, not as individuals, but as the heads of sovereign states, who, by the decree of the Germanic Diet, had previously deprived the appellant of his sovereign authority, which, taken from him, they had conferred upon his brother.

All the allegations of this bill follow from that act. The Duke of Cambridge is, under the authority of a decree of William the Fourth, King of Hanover, and of the reigning Duke of Brunswick, appointed to be the acting guardian of this deposed sovereign, and in that character it is alleged that he received certain sums of money ; and that at a subsequent period when the Duke of Cumberland became King of Hanover, that duty devolved upon him,

¹ See the Instrument, *supra*, pp. 3 and 4.

and the Duke of Cambridge then accounted to him, as the then guardian of the deposed sovereign, and in that character, from the beginning to the end of the bill, that property alleged to have come into the hands of the defendant, is stated to have been received by him under the authority of that appointment to which I have referred.

It is true, the bill states that the instrument was contrary to the laws of Hanover and Brunswick, but, notwithstanding that it is so stated, still, if it is a sovereign act, then, whether it be according to law or not according to law, we cannot inquire into it. If it were a private transaction, as in some of the instances referred to in * the argument was the case, then the law upon which * 22 the rights of individuals may depend, might have been a matter of fact to be inquired into, and for the Court to adjudicate upon, not as a matter of law, but as a matter of fact. But, as I stated at the beginning, if it be a matter of sovereign authority, we cannot try the fact whether it be right or wrong. The allegation that it is contrary to the laws of Hanover, taken in conjunction with the allegation of the authority under which the defendant had acted, must be conceded to be an allegation, not that it was contrary to the existing laws as regulating the right of individuals, but that it was contrary to the laws and duties and rights and powers of a sovereign exercising sovereign authority. If that be so, it does not require another observation to show, because it has not been doubted, that no Court in this country can entertain questions to bring sovereigns to account for their acts done in their sovereign capacities abroad.

For these reasons it does appear to me, that as the bill fails in stating facts bringing the case within the cognizance of the Courts of Equity in this country, the demurrer, which assumes all the facts to be correct as stated, was very properly allowed by the Master of the Rolls. I move, therefore, that your Lordships do affirm his judgment.

LORD LYNTHURST. — I am entirely of the same opinion. None of the acts stated upon the face of this bill was done in this country, nor, as it appears to me, by the defendant in his character of a subject of this country. They were all done abroad; and admitting that circumstances * may exist in which a * 23 foreign Sovereign may be sued in this country for acts done

abroad — about which I say nothing, because it is not necessary to decide such a question upon the present occasion — there are no such facts stated upon the face of this bill as to justify us in entertaining a suit of this description. It must be a very particular case indeed, even if any such case could exist, that would justify us in interfering with a foreign sovereign in our Courts. No such case appears to me to be stated on the face of this bill ; but as it seems to me, upon the proper construction of this instrument, directly the contrary appears. Without, therefore, further entering into the consideration of this question, I am of opinion that the judgment of the Master of the Rolls must be affirmed.

LORD BROUGHAM. — I entirely agree with both my noble and learned friends upon this subject. I had no doubt whatever upon it in the course of the argument. The moment you come to look at the facts disclosed in this bill, which the demurrer admits — for the argument's sake at least admits — and denies the equitable jurisdiction and relief sought ; the moment you see those facts, it is clear in every way, that it is not a case for the interference of a Court of Equity here. It would have been necessary where two foreign princes come to the Courts of this country respecting a matter transacted abroad, to have disclosed such a case as would have shown clearly that it was upon a private matter, and that they were acting as private individuals, so as to give the Courts in this country jurisdiction.

* 24 I will not argue the question as to how far one * Sovereign might sue another in respect of any matter not a matter of state ; it is unnecessary, for that is not the case here. If that had been the case, it might have been fit for us to discuss the point. It is not the case, however, and I agree with my noble and learned friend, (Lord Lyndhurst,) that that not being the case here, there is no occasion to say, one way or the other, how we should deal with such a case if it were to arise. This is quite clear, that, at all events, it ought to have been shown that there were private transactions in order to make it possible that the Court could have jurisdiction. But on the contrary it is clear that these are acts between the parties in their sovereign capacities ; they are clearly matters of state upon which the question arises. It is not at all necessary to say that, supposing a foreign sovereign, being also a naturalized subject in this country, had a landed estate in this

country, and entered into any transactions respecting it, as a contract of sale or mortgage; it is not necessary to say that a Court of Equity in this country might not compel him specifically to perform his contract. That question does not arise here; there is nothing like it; and I do not say that the Courts here would not have jurisdiction in that case, as in the cases of all other parties, subject to their jurisdiction. But this is the case of a foreign Sovereign, doing an act assumed to be in his capacity of Sovereign, he assuming that he has a right to do that act, which assumption is denied by the other party. Although these are matters of state that are in controversy between these parties, the bill, instead of setting forth — what ought to have been done clearly — that they were private transactions subject to the jurisdiction of the Courts in this country, sets * forth the very reverse, and * 25 thereby, in my opinion, excludes the jurisdiction.

I have, therefore, no hesitation whatever in agreeing with my noble and learned friends that the Master of the Rolls has come to a perfectly right decision, ably supported by him in a very elaborate argument, and that his decision ought to be affirmed, with costs.

LORD CAMPBELL. — I am of the same opinion. In the first place, it seems to me that there is no ground at all for contending that this is *res judicata*. When the matter came before Lord Lyndhurst, he did quite right in refusing to quash the letter missive. What appeared before that noble and learned Judge? Why, that there was a bill filed against his Royal Highness “Ernest Augustus, Duke of Cumberland and Teviotdale, in Great Britain, and Earl of Armagh in Ireland, King of Hanover”; and that a letter missive, according to the common proceeding of the Court where a Peer is sued, had issued. Then an application was made to his Lordship to quash that letter missive.¹ I am of opinion that he did quite right in refusing the application, because peradventure the bill might have disclosed matters that would have shown that the Duke of Cumberland was liable to be sued in the Court of Chancery. If he had been a trustee of a marriage settlement, while he resided within this realm, and had become liable, in the execution of the trust which he had undertaken, and which he was not properly executing, I am by no means prepared to say that the Court of

¹ See 6 Beavan, p. 9 note.

* 26 Chancery would not have had jurisdiction over him. * Therefore inasmuch as it was possible that he might have been properly sued in the Court of Chancery, the letter missive was not at all irregular.

But when we come to look at the bill itself, and the cause of suit, that is therein disclosed, I have no doubt that the demurrer is proper. You cannot say that a defendant, after appearing, cannot demur to a bill if it does not disclose any cause of suit over which a Court of Equity has jurisdiction. Well, then, is it not quite clear that this bill does not disclose any matter over which the Court of Chancery has jurisdiction ?

I think the learned gentlemen who have argued this case, with very great ability, were rather sanguine in almost assuming it as a postulate that the Duke of Cambridge might have been sued for this matter. I have most serious doubts upon that point, because even if he had been sued, it would equally have been a matter of state ; the same questions would have been submitted to the Court of Chancery, namely, Whether the King of England as King of Hanover, and William, Duke of Brunswick, acting as sovereigns, had jurisdiction to do the acts which are impeached by this bill. The inclination of my opinion certainly is, that the Duke of Cambridge could not have been sued in a Court of Equity in respect of what he had done under this instrument. But when we find that the party sued is a Sovereign Prince, that he is King of Hanover, and an independent sovereign, then, at all events, it becomes indispensably necessary that the bill by which he is sued in an English Court of Equity should disclose matters over which that Court has jurisdiction.

It has been clearly stated by my noble and learned * 27 * friends that the question that is raised here is as to the validity of an act of sovereignty, because the bill would have been nothing without that allegation that the instrument was absolutely null and of no effect. But that instrument clearly professes to be made in the exercise of powers which those who were parties to it have as sovereigns, and the question of its validity must depend upon whether they have the power to do those acts of sovereignty which they profess to do. I am quite clear, therefore, that this is a matter over which the Court of Chancery has no jurisdiction, and that the demurrer was properly allowed.

I have the most sincere deference for the Court of Chancery, acting within its jurisdiction. I believe there never was a tribunal established in any country which is more entitled to respect, but still there are limits to its jurisdiction, it cannot do every thing. The Lord Chancellor, I presume, would not grant an injunction against the French republic marching an army across the Rhine or the Alps. The Court of Chancery must be kept within its jurisdiction, and then I am sure it confers the highest benefits upon the community. I think it was by this bill called upon to exceed its jurisdiction, and that the Master of the Rolls was acting in conformity to the just principles of the law of this country in ordering the bill to be dismissed.

It was ordered, that the appeal be dismissed, and the decree complained of be affirmed, with costs.

1848. July 31; August 1.

EDWARD THOMAS FOLEY, *Appellant*.

THOMAS HILL and others, *Respondents*.

Banker and Customer. Accounts not complicated, Subject for Action, and not for Bill.

The relation between a Banker and Customer, who pays money into the Bank, is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the customer's drafts; and that relation is not altered by an agreement by the banker to allow the interest on the balances in the Bank.

The relation of Banker and Customer does not partake of a fiduciary character, nor bear analogy to the relation between Principal and Factor or Agent, who is *quasi* trustee for the principal in respect of the particular matter for which he is appointed factor or agent.

Held, therefore, that an account between Bankers and their customer, not long nor complicated, but consisting of a few items and interest, is not a fit subject for a bill in equity.

THIS was an appeal against an order of Lord Chancellor Lyndhurst, by which he reversed a decree of the Vice-Chancellor of England, and dismissed the appellant's bill.¹

¹ 13 Law Journal S. N. Chanc. 182, and 1 Phillips, 399.

In, and previously to, the year 1829, the appellant and Sir Edward Scott, owners of collieries in Staffordshire, kept a joint account at the respondents' bank at Stourbridge, in Worcestershire. In April, 1829, a sum of 6117*l.* 10*s.* was transferred from that account to a separate account then opened for the appellant; and the respondents, in a letter enclosing a receipt for the sum so transferred, agreed to allow 3*l.* per cent. interest on it.

* 29 From 1829 to the end of the year 1834, when the joint * account was closed, the appellant's share of the profits of the collieries was from time to time paid by checks, drawn by the colliery agents against the joint account. These checks were, as the respondents alleged, paid in cash or by bills drawn by them on their London bankers in favour of the appellant, and none of them was entered in his separate account. The only items found in that account were the 6117*l.* 10*s.* on the credit side, and two sums of 1700*l.* and 2000*l.* on the debit side, both being payments made to or on behalf of the appellant in 1830. There were also entries, in a separate column, of interest calculated on the sum or balance in the Bank, up to the 25th of December, 1831, and not afterwards.

The appellant filed his bill in January, 1838, against the respondents, praying that an account might be taken of the said sum of 6117*l.* 10*s.*, and all other sums received by the respondents for the plaintiff on his private account since April, 1829, with interest on the same at the rate of 3*l.* per cent. per annum; and also an account of all sums properly paid by them for or to the use of the appellant on his said account since that day, and that they might be decreed to pay the appellant what, upon taking such accounts, should be found due to him.

The defendants at first put in a plea of the Statute of Limitations,¹ supported by an answer; but the plea being overruled,² they put in their further answer and claimed the benefit of the statute.

A schedule annexed to the answer set forth the separate account of the appellant from the bank book, containing the items and entries before mentioned.

* 30 The Vice-Chancellor, on the hearing of the cause, * decreed for an account as prayed, being of opinion that the

¹ 21 James I. c. 16.

² 3 Mylne & Craig, 475.

respondents were bound in duty to keep the account clear ; that they were to be charged according to their duty, the neglect of which could be no excuse, and that the agreement to allow the interest was in effect the same, in answer to the Statute of Limitations, as if the interest had been regularly entered or paid.¹

Lord Lyndhurst, taking a different view of the case, upon appeal, held, first, that the Statute of Limitations was a sufficient defence ; and, secondly, that the account, consisting of only a few simple items, was not a proper subject for a bill in equity, but a case for an action at law for money had and received, and his Lordship reversed the decree, and dismissed the bill.²

Mr. Stuart and Mr. G. L. Russell for the appellant : —

The judgment appealed from proceeded partly on the ground that the Statute of Limitations is a bar to the appellant's demand, and partly on the ground that the account prayed for is a simple account of debtor and creditor, and, therefore, not a fit subject for a suit in equity. The question is, what is the nature of the relation between a banker and those who deposit money with him, and who are called his customers. If it could be shown that a banker is in the position of a trustee for those who employ him, that he is clothed with a fiduciary character in relation to them, and that there is a personal trust and confidence in him, then the Statute of Limitations would be inapplicable, and the second defence also must be held to fail.

The respondents were not in the relation of mere debtors to the appellant for the money deposited, * which, in ordinary * 31 cases, is considered to be a loan, and therefore a debt ; *Carr v. Carr*,³ *Devaynes v. Noble*,⁴ *Sims v. Bond*,⁵ *Pott v. Glegg*.⁶ The Chief Baron, in *Pott v. Glegg*, doubted whether in all cases there was not an implied contract between a banker and his customer, as to the money deposited, which distinguishes it from an ordinary case of loan, but he yielded to the opinion of the other Judges, that it was a simple loan and debt.

It may be admitted that bankers are debtors, but debtors with various superadded obligations, as, for instance, to repay the money deposited, by honouring the depositor's checks, *Marzetti v. Wil-*

¹ 13 Law Journal N. S. Chanc. at p. 183.

² 13 Law Journal N. S. Chanc. at p. 183, and 1 Phillips, at p. 403.

³ 1 Merivale, 541 note.

⁴ 5 Barnewall & Adolphus, 392, 393.

⁵ 1 Merivale, at p. 568.

⁶ 16 Meeson & Welsby, 321, 328.

liams,¹ according to the custom of the trade; and in this case there was an additional obligation by the special contract to pay interest on the deposit.

It was the duty of the respondents to keep the accounts with the appellant clear and intelligible, to calculate the interest on the balances in their hands from time to time, to make proper entries of it in the account, and to preserve all vouchers and other evidence of their transactions with him. These duties and transactions constitute a relation more complex than that of mere debtor and creditor, and an account of them is a fit subject for a bill in equity, not only by reason of the admitted concurrent jurisdiction of Courts of Equity with Courts of Law in matters of account, but also because the account here sought is of moneys received by the respondents, the receipt of which is within their own knowledge, and the entries and record of which they were bound to keep.

* 32 * The right to an account in equity does not depend on the number of items, and it is no answer to a bill for an account and payment of balances to say that they might be recovered in an action at law. Such a doctrine would supersede the long-established equitable jurisdiction in the cases of stewards and agents and factors in relation to their employers and principals. There cannot be a distinction made between those relations and the relation of banker and employer or customer.

The respondents made entries of the interest in this account up to December, 1831, from which time, for the purpose probably of taking advantage of the Statute of Limitations, they abstained, without notice to the appellant, from making any entry of interest in his account, contrary to their custom as bankers, and in violation of their special duty to the appellant. That constitutes a case of a fraudulent breach of duty, of which, although the bill does not contain any such charge, the Court may nevertheless take cognizance, where it finds the respondents broadly stating in their answer that they omitted to make the entries in order to avail themselves of the Statute of Limitations, a defence which was never before allowed in such a case as this. But the respondents do, however, admit in their answer several transactions in 1831, 1832, 1833, and 1834, connected with the appellant's account, in receiving checks drawn in his favour, and which they say they paid to the person presenting them, either by cash or by bills on

¹ 1 Barnewell & Adolphus, 415.

their bankers. Those admissions would take this case out of the statute, if otherwise pleadable; *Topham v. Braddick*,¹ *Lady Ormond v. Hutchinson*,² *Sterndale v. Hankinson*.³

* It is clear that the accounts sought here can best be dis- * 33
covered and examined in a Court of Equity; and the objection that an action at law is the proper course, not having been suggested in the answer of the respondents, took the appellant by surprise. The case of *Dinwiddie v. Bailey*,⁴ cited on that point before the Lord Chancellor, is not applicable, because some of the matters of which the plaintiff there sought discovery, were, as Lord Eldon observed,⁵ "rather in his own mind than in the defendant's"; and others were capable of proof in an action at law. Courts of Equity entertain jurisdiction in various matters, in which remedy might be had in the Courts of Law, as in bills for partition, assignment of dower, &c.⁶ Lord Redesdale in his Treatise says,⁷ "in matters of account, which, though they may be taken before auditors in an action, &c., yet a Court of Equity, by its mode of proceeding, is enabled to investigate more effectually," &c. His Lordship laid down the same doctrine, judicially, in *O'Connor v. Spaight*,⁸ and it was adopted by this House in the late case of *The Taff Vale Railway Company v. Nixon*.⁹ In *The Corporation of Carlisle v. Wilson*,¹⁰ which was a bill filed for tolls, the Lord Chancellor says: "The principle upon which Courts of Equity originally entertained suits for an account when the party had a legal title is, that though he might support a suit at law, a Court of Law either cannot give a remedy, or so complete a remedy as a Court of Equity, and by degrees Courts of Equity assumed a concurrent jurisdiction in cases of account." * The same principle had been before * 34
recognised in *Barker v. Dacie*,¹¹ and afterwards in *Adley v. The Whitstable Company*,¹² *Ryle v. Haggie*,¹³ *Frietas v. Dos Santos*,¹⁴ and in numerous other cases.

Mr. Bethell, *Mr. Kenyon Parker*, and *Mr. Craig* appeared for the respondents, but were not heard.

¹ 1 Taunton, 572.

² 13 Ves. 47.

³ 1 Simons, 393.

⁴ 6 Ves. 136.

⁵ 6 Ves. at p. 139.

⁶ Mitford Pl. 119.

⁷ Mitford Pl. pp. 120, 123.

⁸ 1 Schoales & Lefroy, at p. 309.

⁹ 1 House of Lords Cases, at p. 121.

¹⁰ 13 Ves. at p. 278.

¹¹ 6 Ves. at p. 688.

¹² 17 Ves. at p. 324.

¹³ 1 Jacob & Walker, at p. 237.

¹⁴ 1 Younge & Jervis, 574.

THE LORD CHANCELLOR. — My Lords, we do not think it necessary to call upon the learned counsel for the respondents to address your Lordships, the appellant not having succeeded in showing any ground for impeaching the decree which has been made in the Court of Chancery.

The bill in this case — as is usual in cases of this description where bills state matters of account, and where there is concurrent jurisdiction at law and equity — alleges that the account is complicated and consists of a great variety of items, so that it could not be properly taken at law. If that allegation had been made out, it would have prevented the necessity of considering any other part of the case. But that allegation has entirely failed of proof; for it appears that the account consisted of only one payment of 6117*l.* 10*s.* to a private account of the customer, and that against that sum two checks were drawn and paid. That is the whole account in dispute as raised by these pleadings. Therefore there is certainly no such account as would induce a Court of Equity to maintain jurisdiction as if the question had turned entirely upon an account so complicated, and so long, as to make it inconvenient to have it taken at law.

* 35 * It has been attempted to support this bill upon other grounds, and one ground is, that the relative situation of the plaintiff and defendant would give a Court of Equity jurisdiction, independently of the length or the complexity of the accounts; although it is not disputed that the transactions between the parties gave the legal right, it is said a Court of Equity nevertheless has concurrent jurisdiction, and that is attempted to be supported upon the supposed fiduciary character existing between the banker and his customer.

No case has been produced in which that character has been given to the relation of banker and customer; but it has been attempted to be supported by reference to other cases supposed to be analogous. These are cases where bills have been filed as between principal and agent, or between principal and factor. Now as between principal and factor, there is no question whatever that that description of case which alone has been referred to in the argument in support of the jurisdiction has always been held to be within the jurisdiction of a Court of Equity, because the party partakes of the character of a trustee. Partaking of the character of a trustee, the factor — as the trustee for the particular mat-

ter in which he is employed as factor — sells the principal's goods, and accounts to him for the money. The goods, however, remain the goods of the owner or principal until the sale takes place, and the moment the money is received the money remains the property of the principal. So it is with regard to an agent dealing with any property ; he obtains no interest himself in the subject matter beyond his remuneration ; he is dealing throughout for another, and though he is not a trustee according to * the * 36 strict technical meaning of the word, he is *quasi* a trustee for that particular transaction for which he is engaged ; and therefore in these cases the Courts of Equity have assumed jurisdiction.

But the analogy entirely fails, as it appears to me, when you come to consider the relative situation of a banker and his customer ; and for that purpose it is quite sufficient to refer to the authorities, which have been quoted, and to the nature of the connection between the parties.¹ Money, when paid into a bank, ceases altogether to be the money of the principal ;² it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker ; it is then the banker's money ; he is known to deal with it as his own ; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases ; he is guilty of no breach of trust in employing it ; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation ; he is not bound to keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the * principal, when * 37 demanded, a sum equivalent to that paid into his hands.

That has been the subject of discussion in various cases, and

¹ As to a banker's right to lien, see *Brandao v. Barnett*, 12 Clark & Finnelly, 787.

² See *Parker v. Marchant*, 1 Phillips, at p. 360.

that has been established to be the relative situation of banker and customer. That being established to be the relative situations of banker and customer, the banker is not an agent or factor, but he is a debtor. Then the analogy between that case and those that have been referred to entirely fails; and the ground upon which those cases have, by analogy to the doctrine of trusteeship, been held to be the subject of the jurisdiction of a Court of Equity, has no application here, as it appears to me.

If that analogy fails, and we come to the mere contract, then the matter is not brought within the rules of a Court of Equity as in reference to other matters of contract. I am surprised to find that this very well known analogy and established principle should be matter of doubt or discussion at this time. But as they have been, I will refer to one or two cases in which the rule and doctrine have been most clearly established, and that, although Courts of Equity will assume jurisdiction in matters of account, it is not because you are entitled to discovery that therefore you are entitled to an account. That is entirely a fallacy. That would, if carried to the extent to which it would be carried according to the argument at the bar, make it appear that every case is matter of equitable jurisdiction, and that where a plaintiff is entitled to a demand, he may come to a Court of Equity for discovery. But the rule is, that where a case is so complicated, or where, from other circumstances, the remedy at law will not give adequate relief, there the Court of Equity assumes jurisdiction.

* 38 * Lord Redesdale's Treatise has been referred to. But, however valuable his treatise may be, it is much more satisfactory when we have, from the same eminent Judge, his opinion declared in the exercise of his judicial duties. For that purpose I will refer to the case of *O'Connor v. Spaight*,¹ in which Lord Redesdale applies the rule. The subject matter there was between a landlord and tenant. There the connection gave no original jurisdiction to the Courts of Equity, but complicated accounts had arisen between the parties, and Lord Redesdale thus expresses himself: "The ground on which, I think, that this is a proper case for Equity is, that the account has become so complicated that a Court of Law would be incompetent to examine it upon a trial at *Nisi Prius*, with all necessary accuracy, and it could

¹ 1 Schoales & Lefroy, at p. 309.

appear only from the result of the account that the rent was not due. This is a principle on which Courts of Equity constantly act, by taking cognizance of matters, which, though cognizable at law, are yet so involved with a complex account that it cannot properly be taken at law, and until the result of the account the justice of the case cannot appear." Lord Redesdale there puts it upon the ground, that it is considered an established principle of the Courts of Equity that it is on account of the infirmity of the jurisdiction at law, for the purpose of taking an account, that a Court of Equity assumes jurisdiction.

Again, in the case of *The Corporation of Carlisle v. Wilson*,¹ referred to for another purpose (it was a case for tolls), the language of the Court is this: "The question is whether, upon the facts stated by this bill, this Court ought to decree an account. The objection is, that the right to take these tolls is, undoubtedly, * a merely legal right, that the plaintiffs therefore may * 39 have a discovery, and, having obtained that, cannot also have relief, but should use the discovery in an action, which undoubtedly might be brought. The principle upon which Courts of Equity originally entertained suits for an account where the party had a legal title, is, that though he might support a suit at law, a Court of Law either cannot give a remedy, or cannot give so complete a remedy as a Court of Equity."

These are principles which those who are conversant with the proceedings of a Court of Equity imbibe from the earliest period of their legal education. It is a well-known rule. The question is whether, in the present case, this demand by the plaintiff is brought within that rule. I am assuming, for the present purpose, that there is nothing in the relative situations of banker and customer which gives, *per se*, the right to sue in Equity; and that is proved, I apprehend, by the consideration of the question, whether, if there had been no money drawn out at all, and simply a sum of money had been deposited with the banker, — I will not say deposited, but paid to the banker, — on account of the customer, a party could file a bill to get that money back again. The learned counsel judiciously avoided giving an answer to that question. But that tries the principle; because if it is merely a sum of money paid to a factor, or paid to an agent, the party has a

¹ 13 Ves. 276.

right to recall it, — he has a right to deal with the factor or agent in his fiduciary character. But the banker does not hold that fiduciary character, and therefore there is no such original jurisdiction; and if there be no such original jurisdiction growing out of the relative situations of the parties, then, to see if the

* 40 account is of * such a nature that it cannot be taken at law, we are to look to the account itself, and not to the bill; we are to look to the facts as they exist. We find no complicated account at all here. There is merely a sum of money paid in on the one hand, for which there is a receipt, which receipt is the evidence of the party's title, and if there be any sum of money drawn out, it is no part of his title and no part of his case; but it is a part of his case to make that demand, and to show that part of that money had not been repaid.

My Lords, that exhausts the case, with the exception of one argument, which your Lordships have heard, with regard to a supposed contract. Here it is a contract by the banker, who, it is said, so far divested himself of his original character as to give a Court of Equity jurisdiction over the subject matter. What is that contract? He agrees to pay 3*l.* per cent. for the use of the money. Then it is said, those 3*l.* per cent. ought to have been entered in the banker's books; that though there was no transaction between the principal and the banker during the lapse of eight years, the banker ought to have entered in his books the 3*l.* per cent. annually or half yearly (it is not very easy to state what the period should be), and that not having done so, he therefore has been guilty of default. Now he might have been guilty of default if he had not kept his contract, — that is, if he had either refused to pay the 3*l.* per cent. or had refused to pay the money when demanded. That was the whole of his contract. He had contracted for nothing more. I can see no breach of contract by this banker, who, if it had been demanded at the proper time, we may suppose would have kept his contract, and have paid the 3*l.* per cent. But because in his own books he has not entered up

* 41 the 3*l.* * per cent. interest, which might have been a beneficial entry for the customer, it is not to be said that that is a breach of contract or a breach of duty. His duty was to account for the 3*l.* per cent. and for the principal. That was all his contract; I do not apprehend that that can possibly make any difference in the question of his liability.

I do not advert to the question on the Statute of Limitations at all, because, if I am right upon this, which is the first question, the Statute of Limitations does not apply. Therefore it is unnecessary to reason upon what the effect might be of that defence being set up, even if there had been a good title in the plaintiff to institute proceedings in equity. The principle upon which my opinion is formed is, that there is nothing to bring the demand within the precincts of a Court of Equity. Upon that ground I think the decree was right in dismissing the bill.

LORD BROUGHAM. — My noble and learned friend (Lord Lyndhurst) — who, from his right of precedence here, would naturally have addressed your Lordships before me — being the Judge from whose decree this appeal is taken — I nevertheless take leave, before he addresses your Lordships, to state my entire agreement in the reasons stated by my noble and learned friend (the Lord Chancellor), and in the opinions at which he has arrived through those reasons, in favour of the decree of the Court below, and shall join with him, or rather shall make, which he omitted, the motion which, from the tenour of his statement, it is evident he meant to make, that your Lordships affirm the decree, with the costs of the appeal.

* I agree with my noble and learned friend, that the ques- * 42
tion of the Statute of Limitations would arise if there was an equitable title, and it came within the proper cognizance of a Court of Equity. But the question does not arise, and I therefore abstain, as he did, from saying a word upon it.

There is clearly no such account, — whatever may be set forth by the bill, — upon the facts of the case, which calls upon a Court of Equity, upon that head of jurisdiction, to give relief. And, in passing, I would observe that, to say that whenever there is a right to discovery, there must be an account allowed, — where that comes in question, — is rather reversing the thing. Discovery, on the contrary, is incident to the order to account. The two things are separate. But the account being excluded by the facts of this case, which show that there is no reason for this statement of account, there being but one sum paid in, and two sums of money drawn out, there is no reason, upon this statement of the facts, for giving relief in equity. The question then comes to be, whether they have succeeded on one or other of the two grounds, the first

of which is, holding the banker to be in a *quasi* fiduciary position towards his customer, and proceeding against him as if he were a trustee; and the other is, whether the stipulation for interest by the banker makes any difference in the case?

Now, with respect to the latter question, arising upon the interest, I think that may be disposed of in a few words. It does not follow that, because a banker contracts to pay any strictly legal demand, therefore that puts the case on a different footing. I should be very sorry if that should be so; because I am sure

the Court of Chancery might have then a bill from every
 * 43 * tradesman for payment of his account, for goods sold and delivered, and wherever there was a stipulation to pay after a certain time, as in many cases there is, in such a case a bill might be filed. But we know pretty well it is the A B C of the practice of the Court of Equity that no such bill can be filed.

I come then to the only other ground, which was the main contention, ably contended in some respects, judiciously in others; I particularly allude to the judicious course taken by the learned counsel, in avoiding to answer the question upon which he was pressed once and again by your Lordships, but who delivered an able argument in other respects. Now, as to the banker: is his position with respect to his customers that of a trustee with respect to his *cestui que trust*? Is it that of a principal with respect to an agent? or that of a principal with respect to a factor? I see no ground for contending that there is any identity in those two points. I am now speaking of the common position of a banker, which consists of the common case of receiving money from his customer on condition of paying it back when asked for, or when drawn upon, or of receiving money from other parties, to the credit of the customer, upon like conditions to be drawn out by the customer, or, in common parlance, the money being repaid when asked for, because the party who receives the money has the use of it as his own, and in the using of which his trade consists, and but for which no banker could exist, especially a banker who pays interest. But even a banker who does not pay interest could not possibly carry on his trade if he were to hold the money, and to pay it
 * 44 back, as a mere depositary of * the principal. But he receives it, to the knowledge of his customer, for the express purpose of using it as his own, which, if he were a trustee he

could not do without a breach of trust. It is a totally different thing if we are to take into consideration certain acts that are often performed by a banker, and which put him in a totally different capacity, for he may, in addition to his position of banker, make himself an agent or a trustee toward *a cestui que trust*; for example, suppose I deposit exchequer bills with a banker, and he undertakes to receive the interest upon them, or undertakes to negotiate or make sale of those exchequer bills, and to credit my account with the proceeds of the sale, I do not stay to ask whether, in that case, he might not be in the position of a trustee, and might not partly sustain a fiduciary character; but he does that incidentally to his trade of a banker; for his trade of a banker is totally independent of that, — his trade of a banker consists in the general trade, to which the other is an accidental addition. This trade of a banker is to receive money, and use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own, and for which money he is accountable as a debtor. That being the trade of a banker, and that being the nature of the relation in which he stands to his customer, I cannot, without breaking down the bounds between equity and law, — without, as it were, removing the landmarks of jurisprudence, — I cannot at all confound the situation of a banker with that of a trustee, and conclude that the banker is a debtor with a fiduciary character. I therefore entirely agree with my noble and learned friend, thinking that the view taken of this case in the Court * below was a correct one, and, therefore, I * 45 move that this appeal be dismissed, and the decree appealed from be affirmed, with costs.

LORD CAMPBELL. — I cannot help thinking that when this case was before his Honour the Vice-Chancellor of England, the decree he pronounced must have proceeded upon some incorrect statement of the facts, and that he had thought that several actions would have been necessary.

My Lords, when you come to examine the facts, it is quite clear that this is a purely legal demand. The relation between banker and customer, as far as the pecuniary dealings are concerned, being that of debtor and creditor. It has been said, that the banker is liable to do something more than merely to repay the money. He is bound to honour checks, and perhaps to accept bills of

exchange, if drawn upon him, he having assets in his hands ; but these are purely matters of legal contract, and, it seems to me, that there is nothing of a fiduciary character at all in the relation subsisting between them.

That being the case, why should this legal demand be recovered by a bill in equity ? The learned counsel at the bar could not contend that a bill could be filed the moment that there was a sum of 1000*l.* entered to the credit of the customer. Then at what time could a bill in equity be maintained ? Is it when one check is drawn ; or when a second payment is made, even of 100*l.* more ? The time when the jurisdiction of equity attaches, is when, at law, there is not a satisfactory remedy, or when, from the complexity of the accounts, it is not a fit case to be referred to a

jury. I most heartily concur in the case of *The Taff Vale*

* 46 *Railway * Company v. Nixon*,¹ in its, I think, most salutary doctrine, that where there are complex accounts, it is a much better thing, though all rests upon a legal demand, to file a bill, and at once to go to the Master's office, and have the accounts taken there, than to bring an action at law, and have that investigation before a jury, for which a jury is clearly inadequate.

There is no such difficulty here. The items are of the simplest description, and the matter might have been settled by a judge and jury at *Nisi Prius*. I therefore think the noble and learned Lord (Lord Lyndhurst) was perfectly right in reversing the decree of the Vice-Chancellor, and that we shall do right in dismissing this appeal.

The other points that were raised in the argument, it is wholly unnecessary to consider, and I abstain from entering into them.

LORD LYNDHURST. — I expressed my opinion very fully upon the subject in the Court below, and, as that opinion is in print,² it appears to me to be unnecessary to repeat the grounds upon which I decided the case.

I entirely concur in the view that has been taken by my noble and learned friends, with respect to jurisdiction in matters of account. I will only refer, therefore, in addition to those authorities which were cited by my noble and learned friend on the Woolsack, to the case of *O'Mahony v. Dickson*.³ It appears to me

¹ 1 House of Lords Cases, 111.

² 2 Schoales & Lefroy, 400.

³ 1 Phillips, 399.

to apply very closely to the present case. The marginal note is this: "The account sought in this case, consisting only of three disputed items, admitted to have been paid, if at all, on account of rent, and * being such as a jury might easily have * 47 investigated; the bill was dismissed, with costs." That almost in its terms applies to the case before your Lordships. I am of opinion, therefore, with my noble and learned friends, that this judgment must be affirmed.

The appeal was then dismissed, with costs.

IN COMMITTEE FOR PRIVILEGES.

LORD DUFFERIN AND CLANEBOYE'S CLAIM.

Evidence. Certificate of Baptism abroad; Copy.

A copy of an entry, made from a certificate of baptism by a chaplain of a British minister at a foreign Court, is not sufficient evidence of birth and parentage.

THIS was the claim of an Irish Peer to vote at the election of representative Peers for Ireland. To prove the claimant's birth, a copy of an entry in a registry of baptisms, kept in a parish church in Ireland, in which the family mansion was situated, was produced. That entry was made in 1827, by direction of the claimant's grandfather, the then Lord Dufferin and Claneboye, from a certificate of the chaplain to the British minister at Florence, stating that the claimant was baptized there by the said chaplain in 1826, as "the son of Captain Price Blackwood and Helen Selina, his wife."

The evidence was not deemed sufficient, under the circumstances, and the case was postponed until the claimant's mother attended and deposed he was the only son of her and the said Price Blackwood, her husband, and was born at Florence in 1826.¹

Resolved, that the claim was made out.

¹ See the Earl of Athlone's Claim, 8 Clark & Finnelly, 262.

1848. August 4, 8, 10.

*Marriage. Infant. Undue Influence. False Publication of
Banns. Consent.*

A young lady, eighteen years of age, entitled to considerable property, her parents being dead, having been passing her vacation at the house of one of the executors named in her father's will, whom she considered as her guardian, was induced by his brother, who was residing in the same house, and was fifty-two years of age, to promise to marry him; she withdrew that promise a few days afterwards, but was importuned again, and prevailed upon to renew it, and the marriage was celebrated without the knowledge of any of her friends, upon a false statement made by him of her age and residence in the publication of the banns and in the register of the marriage. There was no cohabitation, nor consummation of the marriage, as she alleged. She, after a few days, went to a friend's house, and by his advice applied for an act to annul the marriage, the same being considered valid in law:—

Held, that it did not appear by the evidence, that the marriage was not solemnized with the free consent of the lady, and that the case made was not such as to justify legislative interference.

THE preamble to this bill — which was brought in with leave of the House upon a petition¹ — recited that Esther Field, being an infant of the age of eighteen years, was, on the 19th of June, 1847, at Trinity District Church, in the parish of Saint Mary-le-bone, in the county of Middlesex, by “intimidation, fraud and contrivance, and without any free and voluntary consent on her part, made and induced by one Samuel Brown, to marry him,” by banns, according to the rites of the Church of England; that S. Brown was afterwards tried at the Central Criminal Court, and found guilty of having made false statements of certain particulars relating to the marriage, which were, by the Act 6 & 7

*49 Wm. IV. c. 86, required to be * known, for the purpose of being inserted in the register of marriages in the said district church, and he was then suffering the sentence of the law upon the said conviction; and that it was expedient that the said alleged marriage should be declared null and void. The bill then prayed, in the usual form, that the marriage might be deemed and adjudged to be null and void to all intents and purposes.

¹ See *Lords' Journals* for 1848, pp. 570, 661, 685, and 693.

On the day appointed for the second reading of the bill : —

Sir F. Kelly (with whom were *Mr. Rolt* and *Sir John Bayley*) for the petitioner, stated the case at great length, but in substance as follows : —

This petition was presented on behalf of a young, helpless, and most unhappy woman, who appealed to their Lordships, by a special act of justice and compassion to annul the marriage into which she had been intimidated and ensnared, and thus to save her from a fate far worse than death. She was the daughter of a gentleman who resided in Hertfordshire, and died in 1842, her mother having died previously ; so that she was an helpless orphan, with only one brother some years younger than herself. The father left considerable property, consisting principally of real estate, which, by his will, was to be in effect equally divided between his children (there were three, one is since dead), with the benefit of survivorship between them. The share of each of the two survivors was from 1000*l.* to 1200*l.* a-year, or worth about 30,000*l.* altogether.

Unhappily, no guardian of these children was appointed by the father's will. Two persons were appointed executors and trustees, one a Mr. Moore, who acted in that capacity, but did not interfere in the care or education of the children ; the other executor was Mr. John Brown, a brewer and farmer at Tring, in * Hertfordshire, a married man, with a family of children. * 50 He acted as guardian, in all respects, to this young lady. She was, after her father's death, placed under the care of a lady, Mrs. Orme, of Edwardes Square, Kensington, eminently fitted for the task of education, and she remained under her care until the year 1844, when she was placed by the trustees with a Mrs. Roberts, at Penzance, with whom she remained until April, 1847, when, having intended to finish her education in France, she came to spend the vacation at the house of her acting guardian at Tring. She attained the age of eighteen on the 31st of May, 1847.

Unfortunately for this girl, Mr. John Brown had a brother of the name of Samuel, residing in the house with him. This man had been a butler, for some time, in a family in Wimpole Street. He had left that situation, and came to reside with his brother, as his helper. His habits and tastes led him to have a deal to do with the sale and purchase, the management and breeding of horses ;

but, except that business and that he had been butler, he had no trade or calling, nor any property, and he was fifty-two years of age.

This child coming from school into the house of her only guardian and protector, treated him as her father, treated his wife as her mother, and she would naturally treat his brother as her uncle ; and in that sort of intercourse carried on between them, it could never have entered her contemplation that this man of fifty-two, the brother of one whom she treated as a father, and himself being in that situation of life before described, could have treated her otherwise than as a child, upon whom he might bestow care and tenderness, always for her good and protection. Accordingly, she was off her guard ; she was allowed to walk out and to ride on

horseback with him ; and the most unrestricted intercourse

* 51 * as between parent and child undoubtedly took place between her and Samuel Brown, as well as between her and John Brown. This being the kind of life led between him and this young lady, he, a few days before the 18th of May, 1847, proposed marriage to her. She met the proposal as one would naturally have anticipated, — she laughed at him, and told him “ he was old enough to be her grandfather,” and his proposal was met with a firm and decided refusal. But from that hour forth, his system of persecution began and was continued. His power over this unhappy girl and his opportunities were unrestricted. She was in the house of Mr. John Brown, which was her home ; she had no relation, no other friend to go to ; she was exposed to the persecution of this man, to every species of art and intimidation calculated to work upon the best feelings of her nature, and the result was, that within the five days preceding the 18th of May, he succeeded in driving her to a bitterly reluctant consent to become his wife. He pressed his suit ; in vain she said, “ you are old enough to be my grandfather.” Under this pressure she at length was induced to confess to him that it was impossible, even if he had been of suitable age and circumstances, that she could ever become his wife, inasmuch as her affections were already bestowed upon another. When he forced her to confess, what she felt she ought not to confess — and which she did in the guileless simplicity of her heart, in order to get rid of his unseemly and continued persecution — he began to work upon her fear, by threatening mischief and revenge on the object of her affections,

telling her that she should never marry him, or that if she did, he would be revenged upon him, although he would not harm her. He thus filled her mind with that terror * which would * 52 be calculated to produce a strong effect upon a person of her age and sex and feelings, by threatening mischief to the object of her sincere and warm attachment. He did not stop there; he likewise gave her to understand, that if she did not agree to become his wife, he would commit self-destruction.

By this means, by enfeebling and working upon an enfeebled mind — by working upon her fears and upon her affections, which she had disclosed to him she had already formed for another — by threats of mischief to that person if she should ever marry him — he at length succeeded so far in persecuting her into an incapability of further resistance, that on the 18th of May she most reluctantly gave her consent to marry him. He then left the house for Epsom races, and returning after two or three days, he informed her that he had been to London, to procure a marriage licence. That communication was made to her on the 21st of May, and on the 22d, she, who had passed the interval in a state of misery, no longer able to endure the feelings of wretchedness with which her previous consent had filled her mind, told him that she never would perform that promise. She remonstrated with him, again talked of the disparity of their ages, and of her attachment to another, and that, in fact, she could not keep her promise to become his wife; and on that day she withdrew the consent which she had given on the 18th. She had then some repose; but this man's persecution was soon renewed, and was continued at intervals, with more or less violence of language, alternate intimidation and persuasion, threats and reproaches, until, on the 18th of June — just a month after the first promise was extorted from her, and nearly a month after it was withdrawn — she, unable to resist his persuasion, broken * in spirit and bewildered in intellect, again yielded a forced and reckless consent to become his wife. It may be asked why, when thus persecuted, she did not complain to Mr. John Brown, or Mrs. Brown, or make her escape to some friend's house. The answer to that question discloses further the deep designs and base arts of this man, from the beginning. He had, at the time he first proposed marriage to this girl and was refused, exacted a solemn promise from her not to tell any one of the matter, and by the pressure of

that promise of secrecy, she was prevented from appealing to any one for advice or assistance.

Having thus obtained the renewed consent, on the 18th of June he took her to London, on Saturday the 19th, and in pursuance of arrangements previously made by him, in violation of the law, a marriage ceremony was celebrated at Trinity District Church, Mary-le-bone. Practising the same system of deception in respect to the solemnization of the marriage, he had told her that they were to be married by licence at St. George's, Hanover Square, concealing from her that the marriage was to be by banns, which he had, on the 19th of May, arranged to be published on the three subsequent Sundays. Fortunately for this unhappy girl, the marriage has not been consummated. They returned, immediately after the ceremony, to John Brown's house at Tring, as if they had been absent for a morning walk, and then they occupied separate apartments, as they had done previously, until the 24th of June, when she, no longer able to bear the misery of her condition, made her escape to the house of Mr. Smith, at Hemel Hempstead, a short distance from Tring. Mr. Smith, who had been the solicitor and intimate friend of her father, took a great interest in her, and afforded her refuge and protection. It

*54 was afterwards found that one of his sons was the person upon whom she had confessed to Samuel Brown that she had placed her affections. She was at Mr. Smith's some days before an opportunity occurred for telling the tale of her miseries; but the depression of her spirits having excited attention, she was questioned, and she then disclosed the circumstances of the marriage. Mr. Smith, as was his duty, set inquiries on foot, and after diligent search, found that the marriage was celebrated in pursuance of banns, upon the false statement of this man, and without her consent, that they were both of full age, and residing in Wimpole Street, within Trinity Church District.

By the construction put by the Courts upon the Marriage Act, 4 Geo. IV. c. 76, § 22, a marriage celebrated by banns published, in disregard of the directions of that Act, upon a false statement of the age or residence of the parties, with the guilty knowledge of only one of them, is a valid marriage;¹ a provision intended by the legislature for the protection of the woman. But if both par-

¹ The King v. Wroxtton, 4 Barnewall & Adolphus, 640; Wright v. Elwood, 1 Curteis, 49; and Tongue v. Allen, 1 Curteis, 38.

ties participated in the false statement, in violation of the law, and aware of the false publication of banns, nevertheless celebrated the marriage, that would be a void marriage. If this young lady had been a guilty participator with Brown in the illegal publication of these banns, she would, by the operation of the law itself, be redeemed from the wretchedness which drives her to solicit relief by a special interposition of the legislature. Had she been cognizant of Brown's false statement, she would be saved by the existing law ; her innocence is her ruin, while his guilt is his * triumph ; for as he alone violated the law, the mar- * 55 riage is not void ; he has the benefit of his own wrong, and avails himself of his falsehood and of the violation of the law, to maintain this marriage, which was brought about by fraud and falsehood, persecution and intimidation.

Another feature in this case — worthy of notice with a view to the special interposition of the legislature — is, that by the 29th section of the Act 4 Geo. IV. c. 76, any false representation in the registration of marriage was made a felony, punishable with transportation for life. If that section had not been in effect repealed by the Act 6 & 7 Wm. IV. c. 86, for registration of births, marriages, and deaths, — which, by section 41, subjects false representations only to the penalties of perjury, and not of felony, — this man would, for his misrepresentations of the age and residence of this young woman in the publication of the banns and in the register of the marriage, have been liable to transportation for life. So that, if she failed in obtaining the interposition of the legislature to set aside this marriage, she, or her advisers, might have prosecuted him for felony, and caused him to be transported for life, and thereby released her from actual cohabitation with a man whom she loathes, and to whom she never can be reconciled. That is another special ground for the interference of the legislature, to give relief in a case of hardship, which is partly caused by the legislature's own act, and which, without such interposition, remains without a remedy.

This man has been prosecuted, and punished to the utmost extent of the law, for the fraud he committed ; but not in a way to afford any relief to his victim. It happened that, under a bill filed in 1846, for the administration * of her father's * 56 estate, she was made a ward in Chancery, but no guardian was appointed. By the celerity of Brown's movements, and the

power he acquired over her, he had the marriage solemnized before, according to the forms of the Court of Chancery, a guardian could be appointed; but still it was a high contempt of the Court to marry a ward without leave, and for that contempt, this man was committed to prison by an order of the Vice-Chancellor — it being part of the order that the young lady should, until a guardian should be appointed, remain under the protection of Mr. Smith, to whom she had escaped from John Brown's house. By the Vice-Chancellor's directions also, a statement of the circumstances was laid before the Attorney-General, with a view of putting the criminal law in force against Brown, for his false statement of the lady's age and of her and his own residence. The Attorney-General doubted whether the 38th section of the Marriage Act, subjecting a party guilty of such misstatement to the punishment of transportation for life as a felon, was repealed by the Act 6 & 7 W. IV. c. 86 (he, Sir F. Kelly, had no doubt at all that it was repealed), — but entertained no doubt, nor could any one else, that for this false statement through which the marriage was celebrated, the party making it had incurred the penalties of perjury. And accordingly Brown was indicted at the Central Criminal Court, for his false and fraudulent misrepresentations, made in the publication of the banns for the solemnization of the marriage. He was found guilty; and the conviction being affirmed by the Judges on a point reserved at the trial, he was sentenced to six months' imprisonment, — a punishment very inadequate to his guilt. Had he been convicted of felony,

* 57 and transported * for life under the Act 4 Geo. IV. c. 76, this young lady would be free from personal subjection to him, and his right to her property would be forfeited; but his power over her person and fortune returns with his discharge from prison, unless the legislature will humanely interfere to rescue her from such a doom.

Having thus laid the main facts of this case before their Lordships, the proposition which he had to submit, and to support with reference to cases and precedents of legislative interference, was this: Where a marriage has been procured, not by physical force or actual peril of life or limb, but by undue influence, by inspiring the mind with undue alarm — procured by moral force, which a mind of ordinary firmness is incapable of resisting — then, when the facts can be completely proved to the satisfaction of the Eccle-

siastical Court, that Court has the power of declaring the marriage null and void, as wanting that free will and consent which upon religious, moral, and legal considerations is essential to the due celebration of marriage. But where, as in this case, the necessary proofs are to be supplied by the evidence of the party complaining — which is not admissible in the Ecclesiastical Court, but is received in this High Court of Parliament, — then Parliament interposes, and by a special act annuls the marriage which was celebrated without that free will of the parties, which is required by the law to give validity and perfection to it. Happily in this country, from the safeguard which the law throws around the weak, the young and unprotected female, the crime with which this man is here charged is of rare occurrence, and not more than four or five analogous cases are found in the whole judicial and legislative history of the country.

*The first case is that of Miss Wharton, which occurred in *58 1690, and all that is known of it is from the journals and records of Parliament.¹ From them it appears that Miss Wharton was a young lady entitled to a considerable fortune, — in all those cases, it was not affection, however lawless, but rapacity and love of lucre, that prompted men to the commission of this crime. She was returning home at night with a relative from a party, and a gentleman of the name of Campbell (brother to the then Duke of Argyle) with the aid of his confederates, seized her as she was stepping out of her carriage, and carried her to the house of a Mrs. Collingwood, which they had taken for the purpose, and there they induced her to go through the ceremony of marriage with Campbell. It appeared clearly in the evidence that, although she was taken away by force, the marriage and all that followed was apparently with her own will and consent; there was no physical force or threat used at the time of the marriage. It was even sworn that she permitted herself to be undressed and put to bed after the ceremony. It does not appear in the evidence whether the marriage was or was not consummated, but after she was for some time in bed, her friends succeeded in repossessing themselves of her, and then proceedings were taken in Parliament for annulling the marriage, and the legislature passed an act to annul it, on the ground that the lady, in contracting it, had not the liberty

¹ See 10 Commons' Journals (for 1690); and 14 Lords' Journals, pp. 583, 585, 591.

of exercising her free will ; had not the advice and countenance of her friends, and that there was no redress to be obtained for her in the ordinary tribunals. That case was a precedent to govern future cases, and teach wrong-doers that wherever the
 * 59 law cannot afford a remedy * for an egregious wrong, the legislature is not only powerful but humane enough to afford it, and will not withhold it when a proper case is made out.

The next case is that of Miss Knight,¹ in 1697, which had this peculiarity, that the young lady not only of her free will consented to her marriage, but was really attached to her husband, remained with him when she might have gone away ; that she professed her attachment to him, and even petitioned the legislature not to annul the marriage. There was no physical force used in her case either ; but it appeared that she was only twelve or thirteen years of age, had a fortune of 5000*l.* — a large sum in 1697 — and that the marriage was procured by fraud. The mother was a party to the fraud. The person who married her was not a butler or assistant in a stable, like Samuel Brown, but the son of a sergeant at law ; so that there was not any objection in respect of station. Still the marriage having been proved to have been brought about by fraud, the legislature thought she was not of such an age as would confer on her that freedom and power of will, the exercise of which is essential to the validity of the marriage ceremony ; and on that ground dissolved the marriage by Act of Parliament.

The next case, which occurred at the distance of eighty years — which shows the crime is not of frequent occurrence, and that there is no danger of making precedents so as to render marriage an obligation of easy dissolution — was that of Miss Harford, in 1776. That case deserves particular attention, as it closely resembles the present case in many of its features. Miss Harford was

entitled to considerable fortune ; was only of the age of thir-
 * 60 teen, and a ward of Chancery. * Mr. Morris, who married

her, was her guardian, and knowing that she was a lady of fortune, and of an unsuspecting flexible mind, he contrived to induce her to accompany him to places of amusement, and by thus indulging and gratifying her wishes, he obtained an undue influence over her mind. He took her abroad, and there induced her to consent to a marriage ceremony. The statement of her case in

¹ See 12 Commons' Journals (for 1697) ; and 16 Lords' Journals, pp. 146, 148, 149.

the articles exhibited in the Ecclesiastical Court for annulling the marriage was, that "by the arts aforesaid he seduced the said Mary Harford from the house of Mrs. L., and when he had gotten her into a coach, he, in violation of his duty and trust, took advantage of her ignorance and inexperience, and by divers specious pretences and entreaties, persuaded and prevailed upon her to go with him to France; that when she was in France, and wished she was at home, Mr. Morris threatened that he would kill himself if she went home, and that terrified her."¹

How like is that case to the present! Brown was *quasi* guardian to this young lady, being brother to her acting guardian; he knew she had considerable property; he used to accompany her out on horseback and to amusements; he threatened to destroy himself if she would not marry him. In fact the case of Miss Harford was in all respects, except the age of the young lady, a weaker case than this; for here we have not only the same acts and the same threats, but further, after this poor girl confessed to Brown that her affection was bestowed on another person, we find him further operating on her enfeebled mind by threatening mischief to that other person.

The Spiritual Court decided in Miss Harford's case, that the circumstances as proved were not sufficient * to warrant * 61 a decree of nullity of the marriage. There was then an appeal to the Court of Delegates — which consisted of three Bishops, three Temporal Peers, three Judges of the Common Law Courts, and three eminent civilians — and they unanimously reversed the decision of the Spiritual Court,² and declared the marriage void upon the ground that the young lady had not that free will to consent or refuse, which is essential to the validity of a marriage; and that the situation of Morris in regard to her made the marriage a fraud. That case must, from the constitution of the Court that decided it, be regarded as a case of the highest authority, and ought to have much weight with the House in disposing of the present case.

Another long interval elapsed before any case occurred of an offence leading to an application by the victim of it to the legislature for a nullity of the marriage. The case of Miss Turner, which occurred in 1827, must be in the recollection of most mem-

¹ 2 Haggard Cons. Rep. 423; see p. 426.

² 2 Haggard Cons. Rep. 436.

bers of the House.¹ That case, though much weaker than this, is strictly analogous in principle. Miss Turner was in her 16th year, and at school, when she was induced to leave it, upon a false representation that her father sent for her. On her way home, as she thought, she was met by Edward Gibbon Wakefield, the wrong-doer in that case, and was prevailed on by him to believe that her father was on the eve of bankruptcy, and could be saved from total ruin only by her consenting to marry him, Wakefield; she, believing his statement, and in her natural grief and affliction for her father, wishing to avert the calamity which she was told was impending, consented to the marriage. They pro-

ceeded to Gretna Green, where a marriage ceremony was * 62 performed, * after which Wakefield bore her away to Calais, where they remained for some days at the same hotel, until the young lady, having been traced there, was brought away by her relatives, who had gained access to her, and explained how she had been deceived, whereupon she expressed her indignation at the fraud practised on her, and her abhorrence of the author of it. The circumstances of that case would be sufficient to entitle Miss Turner to a sentence of nullity of the marriage in the Ecclesiastical Court; but as they could be proved only by herself, and her evidence would not be admissible in that Court, an application to it was useless. She therefore petitioned Parliament, and her case was brought first before this House, and an Act was passed by the legislature annulling the marriage. See 2 Lewin C. C. p. 21.

There was no physical force used in Miss Turner's case; no compulsion on her to go through the ceremony; no threat of personal injury to her or to any one; there was no bodily fear. She consented to the marriage, and went through the ceremony of her free will, but she did so under the belief that her father was threatened with a great calamity, which nothing but her consent to the marriage could avert. So in this case there was no physical compulsion, nor apprehension of bodily injury to Miss Field; but she consented and went through the ceremony of marriage under the terror inspired by Brown's threat of destroying himself—who stood in the relation of friend and guardian to her—and under the more grievous terror, arising from the threat of mischief to the man on whom she had placed her affections. What is the distinc-

¹ 2 Lewin C. C. 1.

tion in principle between the two cases? None whatever. All that can justly be required is to prove that this young lady acted under intimidation and fraud, * to entitle her to the * 63 relief she seeks. If there was no power in this country to which she might successfully appeal for relief and protection against this man, there would be a failure of justice, an injury without a remedy, contrary to the much-lauded constitution under which she lives. But the precedents which have been cited show that whenever a fitting case has been made out, and neither religion nor morality nor right nor justice forbids the interposition of the legislature; that when, on the contrary, morality, right, and justice imperatively call for protection of innocence against fraud and crime, the legislature never refuses to interpose. If it shall be made apparent, as it will be, that religion, morality, duty, conscience, and justice cry aloud for the dissolution of this marriage to save this innocent but unhappy girl from being the victim of the rapacity of this man — who ought to have protected her as a father, instead of making her his victim — her appeal will not be made in vain to an all-powerful legislature to extend to her the same protection that was extended to those other victims of men's artifices, as exemplified in the cases that have been referred to. The great question for the legislature to consider is, whether by allowing this marriage to stand, a grievous wrong will not be perpetrated, while by annulling it no wrong at all will be done. That consideration involves another great question, — a question of principle, — which is, whether this marriage has been celebrated with that free and unfettered consent of both parties which religion and the law alike require, or whether it has been brought about by fraud and persecution and intimidation, or by any other of those undue means which the legislature will never permit to be successful. The interposition of the legislature * is * 64 sought in this case, as it was in Miss Turner's, upon the principle that this, like hers, being a valid marriage, redress cannot be obtained from the ordinary tribunals of the country; or being of doubtful validity, it cannot be set aside in the Ecclesiastical Court on account of the rules of evidence, which do not admit either of the parties to a marriage to be a witness in a suit to dissolve it; and in this case the knowledge of the facts affecting the validity of the marriage is derived from the parties to it, and from them only.

The precedents that have been referred to justify this application ; but if there were no precedents, that would be no reason for the refusal of relief from the legislature, which is intrusted with transcendent power, not for evil but for good. If, therefore, a case were made out, though wholly without precedent or analogy to any previous case, but in which the legislature should be satisfied that it alone could afford relief, it would be the duty of the legislature on that consideration alone to interpose its unbounded power, which was conferred on it for the well-being of the whole people. It was upon that principle that this House, in the Session of 1843, initiated a measure for the preservation of the Marquess Townshend's honours and estates¹ to his brother and family, against an invasion of them by the Marchioness's illegitimate children — a measure, although opposed by a very high authority (Lords Cottenham, Devon, and other Peers²) received the sanction of the House, and was passed into law. The object of that act was not

to dissolve or annul a marriage, but to bastardise the wife's
 * 65 children, who were themselves blameless — an * object certainly not so unexceptionable as the object of the bill in Miss Field's case. By this bill no human being can be prejudiced ; there is no issue, nor possibility of issue, of this marriage, which fortunately was never consummated. That fortunate circumstance was proved in the proceedings in the Court of Chancery, before referred to, and will be proved again at this bar by the oath of the young lady herself, and by such other evidence as the matter is capable of, and which shall be, if not perfectly conclusive, at least such as to satisfy the House that her statement is founded in truth : —

LORD BROUGHAM. — Was Miss Turner examined in support of her bill in this House ?

LORD RADNOR. — Yes, she was.

Sir F. Kelly. — If any doubt were to be raised as to the non-consummation of the marriage it is to be remembered, and will be likewise proved, that on the fifth day after this unhappy marriage was celebrated, this young lady quitted Brown's house, and had no communication since with Samuel Brown or any of that family ; and now more than a year has elapsed, so that whatever may be

¹ 10 Clark & Fennelly, 289. The report there is, by mistake, headed "In Committee of Privileges."

² 10 Clark & Fennelly, 314.

the truth respecting the consummation, all idea of issue is out of the question —

THE EARL OF DEVON. — Is it not for the party who opposes the bill to urge that point, if it be a part of his case? It is for him to show that this proceeding would be prejudicial to the rights of third parties: it is not a point for the petitioner to anticipate.

Sir F. Kelly was glad to be thus relieved from that part of the case, although he was perfectly prepared to meet the suggestion, if it should be made on the other side.

* There was one point more requiring observation: one * 66 objection to applications for bills of this sort is, that precedents multiply and lead to too great a facility for the dissolution of marriage; so that couples who get tired of each other might by collusion make out an apparent case for the interposition of the legislature, and so set aside their marriage by Act of Parliament. In this case there is no ground for even the suspicion of collusion; the nature of the case negatives the possibility of it. Again, it might be objected, if long cohabitation had taken place, even without issue, that it would be contrary to morality, and an encouragement to vice, to dissolve the marriage. Here there is no ground for such an objection, as there was no cohabitation, the petitioner having escaped five days after the marriage to Mr. Smith's, under whose protection she has since continued.

The case upon the whole is this: Here is a very young lady, betrayed, persecuted, and intimidated into a consent to marry; having a moment for reflection, in the absence of her persecutor, she withdraws her consent, and resists his renewed persecution for weeks; but at last, with a debilitated mind, teased and worked upon, and its powers frustrated by this man's worrying, she at length in an evil hour again consents, and then by fraud and violation of the law a marriage is celebrated. Here she is, at one side of this bar, an orphan, helpless, unprotected, and unhappy — a young lady yet innocent and undefiled, with her affections previously bestowed on another, a person of suitable age and position in society; all which was well known to this man, who seeks to take her to himself. He stands at the other side of this bar, old enough to be her grandfather, who has persecuted and oppressed her; who has availed himself of the opportunities * afforded him by his being in the situation of a * 67 guardian, to gratify — not any passion for her, bad as that

would be, but worse,—his base desire to possess her fortune ; will this House — holding and exercising the supreme power of the state, wisely conferred for the well-being of the community — will this House, under its responsibility to God and to the country, deliver this poor girl over to such a man, and consign her to a life of misery and pollution in the loathsome embraces of this man, her heart having been, as he knew, given to another person ? As a ward in Chancery, under her father's will, her fortune may be settled on her ; but this man will be entitled, unless the legislature interferes, to compel cohabitation, and therefore to enjoy her fortune through her, for her enjoyment of it would be his, and therefore he will reap the reward of his rapacity and fraud, and violation of the law.

LORD RADNOR. — Is there any reason or explanation given why Miss Field did not sooner betake herself to Mr. Smith's protection ?

Sir F. Kelly. — A promise of secrecy had been extorted from her ; it was part of the art and contrivance of this man to obtain a promise from her — thus turning her honourable principles to her destruction — to keep his designs on her a secret, but for which, no doubt, she would have sooner resorted to the protection to which she fled at last.

Esther Field, examined by Sir F. Kelly, said she was nineteen years of age the 31st of May last (1848). Her father died in 1842, leaving her and two brothers, one of whom has since died: her mother died long before. By her father's will, a Mr. Moore, and Mr. John Brown, of Tring, brewer and farmer, were appointed executors: since her father's death she had no guardian * 68 but Mr. J. Brown and his * wife ; they have three children. Having been placed by J. Brown with a Mrs. Orme, for her education, she remained with her two years, and was then removed to the care of a Mrs. Roberts, at Penzance, with whom she finished her education, and returned to Mr. J. Brown, at Tring, on the 5th of April, 1847. Samuel Brown, brother of John, was living there, assisting in the business ; he was fifty-two years of age ; she had known him all her life ; he was very kind, and paid much attention to her, — used to ride out and go to places of amusement with her when his brother could not go, and she considered him the same as her guardian. On the 18th of May he asked her to marry him — he had been then, and for some days before, more affectionate than usual ; she did not understand it and did not take any notice ; when he asked her to marry him, she was surprised, laughed at him, and said she could not think of such a thing, for he was old enough to be her grandfather ; he was angry at her refusal, and left her, after begging her never to mention the matter to any one — which she promised ; he came back, was very violent in his language ; she was frightened, depressed in spirits, and bewildered ; he said he would shoot himself if she did not consent, and would also injure Mr. Montague

Smith, on whom she said she had bestowed her affections ; believing he meant all he said, she consented, not from love or liking for him, but most unwillingly, in consequence of her fright. He left the house early on the 19th of May for Epsom races, and returned on the 21st. On the 22d she told him she had been very unhappy in mind for having promised to marry him, that she could not keep that promise, that he was too old, and she was attached to Montague Smith, which she would not confess, but she hoped it would prevent further annoyance. He for some days kept constantly taunting her for not keeping her promise. She did not tell Mr. or Mrs. J. Brown of the matter, because she had promised Samuel she would not tell any one. He kept constantly persecuting her to the 18th of June, when, after continually refusing him, she was again induced to consent to marry him, not voluntarily nor from affection, but being in so excited and bewildered a state that she scarcely knew what she said. The next day, * the 19th, being fixed for the marriage, she, after spending a restless 69 * night, came down, and they breakfasted together earlier than usual, and before John Brown and his wife came down. They left in a chaise, saying they were going to Chardlowes to see the gardens, but they drove direct to Drayton railway station, and proceeded by railway to London, went to the clerk's house in Mary-le-bone, and with him and his wife to Trinity Church, and were married. She did not know it was by banns, as he had told her they were to be married by licence in St. George's Church. In going through the ceremony, she certainly gave her consent, though it was unwillingly given. He had previously told her if any questions were asked, he would answer them, and he did answer questions that were asked by the clergyman after the ceremony. They then returned to the clerk's house, had cake and wine, then visited two or three shops, and returned by rail the same day to Drayton, and thence by Chardlowes to Tring, where they arrived about six o'clock. For the five nights, from the 19th to the 24th of June, she slept, as usual, with one of John Brown's daughters ; and on the 24th, she went, by invitation, to Mr. Smith's, at Hemel Hempstead : he was the friend and adviser of her father. He has three sons and five daughters. Montague Smith was the second son. On the 28th she disclosed the circumstance of her marriage, first to Montague, and then to his father, who, by her desire, took proceedings in Chancery.

Cross-examined by Mr. Ballantine, counsel for the husband. — She said her father had been well acquainted with John and Samuel Brown, and she heard that her sister, much older than herself, and long since dead, had been engaged to marry John Brown. After her father's death, in 1842, she went to John Brown's, and remained there two months before she went to school ; she used to spend her vacations there. She heard Samuel Brown was fifty-two years old, but had no knowledge of his age. After laughing at his proposal, and saying he was old enough to be her grandfather, she consented to marry, because he was very violent and threatening in his speech, and she was frightened into consent by his threatening to destroy himself. During the absence * of John and * 70 Samuel Brown at Epsom, on the 19th of May, she was alone with Mrs. Brown, and could, but did not, tell her that Samuel exacted the promise of marriage, because she had promised him not to tell any one about it. She used sometimes to go to Mr. Smith's from Brown's, but both the Browns disliked her going.

Edward Speller, clerk of Trinity District Church, in his examination, said, that on Sunday, the 23d of May (1847), Samuel Brown came to him, just as he was going to church, and in his hearing he took down, in pencil writing, the particulars for the publication of the banns (a copy of which he produced) which were published on that day and on the 30th of May and 6th of June. He came again with the young lady to witness's house on the morning of the 19th of June, when witness and his wife went with them to the church where they were married by Mr. Robinson the clergyman.

In cross-examination, witness said the young lady did not appear agitated or nervous, — as some ladies are on similar occasions, — but took it all very coolly. Witness and his wife signed the register as witnesses. No other person except the clergyman was present.

Mrs. Speller, wife of last witness, said they came to her house about eleven o'clock on the 19th, in a cab, and Brown asked her to be bridesmaid, as they had no one. The young lady went up stairs, and was alone with witness for about five minutes, and seemed quite composed. They and witness went in the cab to the church, and after the ceremony was performed, came back to witness's house, where luncheon, consisting of coffee, wine, &c., had been prepared by Brown's directions. They were alone in the room for half an hour; witness did not see them eat, but she saw that nearly all the luncheon was gone.

The Reverend Mr. Hamilton said, he solemnized the marriage between Samuel Brown and Esther Field on the 19th of June, 1847. The register (which was produced) is generally prepared by the clerk before the marriage, in order that the parties may not be delayed; and after the ceremony the custom is for the clergyman to read the first line, relating to the husband, as "Samuel Brown, full * 71 age, bachelor, gentleman, * 31, Wimpole Street," &c., and to ask, "Is that correct, Mr. Brown?" and then to read the line relating to the woman, as "Esther Field, full age, spinster, Wimpole Street," &c., and ask her if that is correct. He had no doubt, although he did not recollect it, that he went through that form with this couple, and that unless the impression had been most distinctly conveyed to his mind, by word or nod, — by which assent is sometimes expressed, — that the particulars of the entry so read from the register were correct, he would not have signed the register, nor have allowed the parties to sign it. When the particulars of the entry are read, and the question put, unless dissent is expressed, assent is inferred.

Another witness proved that Samuel Brown was butler to Miss Clitherow, 31, Wimpole Street, eleven years ago; and Mr. Steele, a medical gentleman who knew Miss Field all her life, said he saw her at Mr. Smith's on the 24th of June, — the day she arrived there, — and again on the 26th and 27th. She was in a state of tremulousness, nervous agitation, and depressed — wanting her usual alacrity. He apprehended that fever was forming, and he recommended to her to be quiet and at rest, — not to accept any invitation out. Her illness was entirely bodily.

Mr. William Smith, solicitor, of Hemel Hempstead, and other witnesses, were examined as to the facts stated by Sir F. Kelly, and their evidence is set out at great length on the Journals (for

1848), but as the question for the consideration of the House was, whether the lady's consent to the marriage should, under the circumstances, be held binding, no more of the evidence is here given than was material to that point.

Mr. Rolt summed up the whole of the evidence.

Mr. Ballantine, for Samuel Brown,¹ was about to address the House—

* THE EARL OF DEVON.²—Before you go on, Mr. Ballan- *72
tine, I wish to state what the feeling of the House is.

The case of the promoters of the bill has now been fully gone into, and it has been listened to patiently by the noble Lords who have attended here from the commencement, and I need not say that I have listened to it with every possible attention; and, certainly, I, having originally introduced the bill into the House, came to the consideration of it with as much prepossession in favour of it, and with as much desire to see that it was a remedy that we might justly afford, as was at all consistent with the character of an individual legislator. I am afraid I had a great prepossession in favour of the party bringing forward such a bill.

Now the evidence has been gone through, and undoubtedly it does not assume that character in Miss Turner's case to which Lord Tenterden adverts, in his observations that have been reported to us in Sir F. Kelly's speech—namely, that of a case of overpowering strength. On the contrary, I am of opinion that the facts, as they appeared before us, relative to the conduct of Miss Field immediately preceding the marriage and during the day of the marriage, were not such as would justify us in holding that that which appears to be a consent was so far influenced by fear or the continuance of any persecution, as to justify the legislature in interfering, by an act of rather a peculiar nature, to render void the contract which has been solemnized in the face of the church and is binding in law. Of course, my individual opinion would not signify much, except so * far as it would influence my *73
own conduct, with reference to the further proceeding with the bill. I thought it my duty to consult with every one of the

¹ Leave had been granted to him, on his petition, to appear by counsel and examine witnesses against the bill.

² His Lordship was the only law Lord present, after the first day, and he presided during the examination of the witnesses, and Mr. Rolt's summing up.

noble Lords who have attended to this case, and whose opinion is of quite as much weight as any of the law Lords. I have consulted Lord Denman ; I have consulted Lord Lyndhurst, and I know my Lord Chancellor's opinion from what he has said of the case, though he has not attended to it so fully as the others. My Lord Lyndhurst has read everything that was put in evidence before your Lordships, and he has a strong opinion in accordance with mine.

Under these circumstances it does appear to me to be unnecessary to call upon the counsel in opposition to the bill to address any observations to the House ; because, assuming the case to stand as it now stands, as it is represented by the promoters of the bill, I, for one, am not prepared to move the second reading of the bill, and none of the noble Lords who have heard the case is prepared to do so. I do not, under these circumstances, conceive that the promoters of the bill would wish that the time of the House should be wasted by further proceeding with it.

The bill was dropped.

WORTHAM'S CASE.

A case — similar to the above in many of its circumstances — was brought before the House in 1846, upon petitions for leave to bring in “A Bill to dissolve, rescind, and make void the marriage of William Newnham Burton and Frances Louisa Wortham.” She was entitled to real estate of 450*l.* a year, and was only fourteen years of age when taken away from her mother, a widow, by W. N. Burton, and married to him at Gretna Green. There was cohabitation, and birth of a child. On Lord Brougham's motion, the petitions of the mother and daughter, together with the evidence on the trial of Burton for the abduction, were printed ; but no further proceeding was taken. (See 76 Lords' Journals (for 1846), pp. 76, 96, and 303.)

*BAILLIE v. EDWARDS.

*74

1848. August 1, 4.

ALEXANDER BAILLIE, *Appellant*.EDWARD EDWARDS and another, *Respondents*.*Principal and Agent. Consignee and Trustee. Accounts. Set-off.*

Innes, consignee of a West Indian estate, was appointed trustee thereof by B., the tenant for life, for the purpose of keeping down incumbrances. Innes was also private agent and banker for B., with the understanding that B. was not, nor were his funds, to be liable for advances made by Innes for the estate; Innes, becoming embarrassed, was declared bankrupt, and assignees were appointed: *Held*, by the Lords, — reversing orders of the Court of Chancery, on a bill filed by B. and the other owners of the estate, to remove Innes from the possession and management, — that a sum found due from Innes to B., on their private dealings, might be set off against a sum found due to Innes in respect of his advances and payments for the estate.

THE appellant was, under his father's will, dated in 1793, tenant for life of the Bacolet estate, in the Island of Grenada, subject to the payment of an annuity to the testator's widow, and of legacies to his five younger children, in the event of the insufficiency of the personal estate, — which was the case.

By an indenture, dated in 1812, Messrs. Winter and Innes, merchants, in partnership in London, and then consignees of the Bacolet estate, were appointed trustees thereof, for the purpose of regularly paying the annuity and interest on the legacies, and of gradually reducing the principal of the legacies. They acted also as private agents and bankers to the appellant. Winter died in 1824, from which time Innes continued the same connection with the estate, and with the appellant, respectively. Considerable advances were made from * time to time by Winter and * 75 Innes, and, after Winter's death, by Innes, on account of the estate, with the express understanding that the appellant should not be personally liable for them, and that the consignees should look for repayment to the estate alone.

A large sum was claimed by Innes to be due to him in 1831, on account of the supplies furnished to the estate, and in respect of payments made by him to the annuitant and legatees, exceeding

the proceeds of the estate. The appellant, on the other hand, claimed a large balance to be due to him from the firm of Winter and Innes, and from Innes, on account of the various dealings and transactions between them and the appellant on his separate account.

The suit, in which this appeal arose, was instituted in 1832 by the appellant and his brothers, who were entitled to the reversion in the Bacolet estate, against Innes and the representatives of Winter and others, for the purpose of redeeming the estate and taking it out of the management of Innes. He was declared a bankrupt in 1833, before he put in his answer, and, thereupon, his assignees, Thomas Palmer and Edward Edwards, were made defendants to the suit by supplemental bill. In their answer to the bill they stated their belief that the expenses in respect of the estate, and the payments made by Innes, greatly exceeded the proceeds thereof, and that a balance of 9191*l.* was due to them as his assignees in respect of his advances towards the said expenses and payments, and for supplies furnished by him for the estate ; and, in reference to allegations and charges in the bill, suggesting a question of set-off, they said they were informed, and they be-

lieved that Innes was indebted in a large sum to the appellant in respect of the dealings that * Winter and Innes,¹ and * 76 Innes alone, since Winter's death, had with the appellant, and they submitted to the Court whether Innes, and they in his right, as his assignees, were entitled to be paid the said sum of 9191*l.* until the said sum due to the appellant from Innes was paid ; and they said they heard, and believed, that the appellant was not personally liable to Innes for the said balance, and that notwithstanding the larger balance due to the appellant from Innes, he, Innes, was entitled to retain the Bacolet estate until the said sum of 9191*l.* was paid, and they submitted whether they, in his right, were not so entitled.

The Vice-Chancellor made a decree in the cause in 1834, referring it to the Master to take the several accounts prayed for by the bill, and in taking such accounts, he was to have regard to all such rights, if any, of lien and set-off as the appellant and other parties to the suit might be entitled to.

¹ The appellant's claim on the partnership of Winter and Innes was settled in another suit instituted for taking the partnership accounts. See *Winter v. Innes*, 4 Mylne & Craig, 101.

In order to save expense of part of the accounts, the claim of Innes, and of his assignees, in respect of his advances in payment of the charges on the Bacolet estate was adjusted, by compromise, at 8000*l.*, without prejudice to any claim of lien or set-off; and the Master's report that that was a proper adjustment, beneficial to all parties, was confirmed; and it was ordered that the assignees of Innes should be entitled to the dividends to accrue due on so much of the Bank annuities standing to the credit of the cause as was equivalent in value to the sum of 8000*l.*, but without prejudice to the appellant's claim of set-off; and accordingly, * the sum of 8920*l.*, 3*l.* per cent. Bank annuities, the agreed * 77 value of 8000*l.*, together with 133*l.* in cash, was ordered to be carried over to an account, entitled "The Contingent Account of the defendants, Thomas Palmer and Edward Edwards, assignees of the defendant Innes," with the usual direction for investment and accumulation of dividends. (These Bank annuities were part of a larger sum of like stock standing to the credit of the cause, which arose from compensation money paid in 1836 for the slaves, &c. on the Bacolet estate, under the Act for the abolition of slavery.)

The Master, by his general report in 1841, found the sum of 11,884*l.* to be due to the appellant in respect of the separate dealings and transactions between him and Innes, but he was of opinion that the appellant had no right to set off that sum, or any part of it, against the debt due to the assignees of Innes from the Bacolet estate.

To this report exceptions were filed by the appellant, on the ground that the Master ought to have reported in favor of his claim of set-off. The Vice-Chancellor, upon the hearing of the exceptions, and of the cause on further directions at the same time, made an order, dated the 15th of July, 1842, overruling the exceptions, with costs, and declaring on the further directions that the sum of 10,460*l.* and upwards, then standing to the credit of the cause, to "The contingent account of Palmer and Edwards, assignees of Innes," which sum was produced by the said sum of 8920*l.* Bank annuities, and the accumulation and investment of the dividends thereof, belonged to Palmer and Edwards as assignees of Innes.

That order was affirmed, on appeal, by Lord Chancellor

the proceeds of the estate. The appellant, on the other hand, claimed a large balance to be due to him from the firm of Winter and Innes, and from Innes, on account of the various dealings and transactions between them and the appellant on his separate account.

The suit, in which this appeal arose, was instituted in 1832 by the appellant and his brothers, who were entitled to the reversion in the Bacolet estate, against Innes and the representatives of Winter and others, for the purpose of redeeming the estate and taking it out of the management of Innes. He was declared a bankrupt in 1833, before he put in his answer, and, thereupon, his assignees, Thomas Palmer and Edward Edwards, were made defendants to the suit by supplemental bill. In their answer to the bill they stated their belief that the expenses in respect of the estate, and the payments made by Innes, greatly exceeded the proceeds thereof, and that a balance of 9191*l.* was due to them as his assignees in respect of his advances towards the said expenses and payments, and for supplies furnished by him for the estate; and, in reference to allegations and charges in the bill, suggesting a question of set-off, they said they were informed, and they be-

lieved that Innes was indebted in a large sum to the appellant in respect of the dealings that * Winter and Innes,¹ and Innes alone, since Winter's death, had with the appellant, and they submitted to the Court whether Innes, and they in his right, as his assignees, were entitled to be paid the said sum of 9191*l.* until the said sum due to the appellant from Innes was paid; and they said they heard, and believed, that the appellant was not personally liable to Innes for the said balance, and that notwithstanding the larger balance due to the appellant from Innes, he, Innes, was entitled to retain the Bacolet estate until the said sum of 9191*l.* was paid, and they submitted whether they, in his right, were not so entitled.

The Vice-Chancellor made a decree in the cause in 1834, referring it to the Master to take the several accounts prayed for by the bill, and in taking such accounts, he was to have regard to all such rights, if any, of lien and set-off as the appellant and other parties to the suit might be entitled to.

¹ The appellant's claim on the partnership of Winter and Innes was settled in another suit instituted for taking the partnership accounts. See *Winter v. Innes*, 4 Mylne & Craig, 101.

In order to save expense of part of the accounts, the claim of Innes, and of his assignees, in respect of his advances in payment of the charges on the Bacolet estate was adjusted, by compromise, at 8000*l.*, without prejudice to any claim of lien or set-off; and the Master's report that that was a proper adjustment, beneficial to all parties, was confirmed; and it was ordered that the assignees of Innes should be entitled to the dividends to accrue due on so much of the Bank annuities standing to the credit of the cause as was equivalent in value to the sum of 8000*l.*, but without prejudice to the appellant's claim of set-off; and accordingly, * the sum of 8920*l.*, 3*l.* per cent. Bank annuities, the agreed * 77 value of 8000*l.*, together with 133*l.* in cash, was ordered to be carried over to an account, entitled "The Contingent Account of the defendants, Thomas Palmer and Edward Edwards, assignees of the defendant Innes," with the usual direction for investment and accumulation of dividends. (These Bank annuities were part of a larger sum of like stock standing to the credit of the cause, which arose from compensation money paid in 1836 for the slaves, &c. on the Bacolet estate, under the Act for the abolition of slavery.)

The Master, by his general report in 1841, found the sum of 11,884*l.* to be due to the appellant in respect of the separate dealings and transactions between him and Innes, but he was of opinion that the appellant had no right to set off that sum, or any part of it, against the debt due to the assignees of Innes from the Bacolet estate.

To this report exceptions were filed by the appellant, on the ground that the Master ought to have reported in favor of his claim of set-off. The Vice-Chancellor, upon the hearing of the exceptions, and of the cause on further directions at the same time, made an order, dated the 15th of July, 1842, overruling the exceptions, with costs, and declaring on the further directions that the sum of 10,460*l.* and upwards, then standing to the credit of the cause, to "The contingent account of Palmer and Edwards, assignees of Innes," which sum was produced by the said sum of 8920*l.* Bank annuities, and the accumulation and investment of the dividends thereof, belonged to Palmer and Edwards as assignees of Innes.

That order was affirmed, on appeal, by Lord Chancellor

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That order was affirmed, on appeal, by Lord Chancellor

- *78 *Lyndhurst, by an order dated the 7th of May, 1845, dismissing the appeal with costs.¹

This appeal was brought against both the orders.

Mr. Bethell and *Mr. Wood*, for the appellant, contended that he had a clear right to redeem his life interest in the Bacolet estate from the lien of Innes, with the money which Innes owed him. That right was not abandoned or in the least degree affected by the contract that the appellant should not be personally liable to Innes for his advances. The right of set-off was expressly recognised by the decree of 1834, in the direction to the Master in taking the accounts thereby referred to him, "to have regard to all such, if any, rights of lien and set-off as the appellant or other parties to the suit might be entitled to." The lien there referred to, was the charge which Innes had on the Bacolet estate, and which, under the indenture of 1812, must be held to be limited to the appellant's life interest in that estate. The right of set-off so referred to in the decree, was the claim of the appellant to discharge such lien, by telling Innes to retain the sum found due to him from the estate out of the sum he was found to owe to the appellant. The case was just the same as if the appellant said to Innes, "You have a claim for 8000*l.*, with the dividends thereof since 1837, against my estate; you owe me on my private account 11,884*l.*; and, although I am not personally liable to you, nor are my funds in your hands liable to the payment of your charges, I desire to pay them out of the monies you have of mine, and to take back my estate." If that offer had been made to Innes

- *79 *in 1832, before his bankruptcy — had the mutual debts been then ascertained — he could not make any objection to it. Are his assigns in a better position than he was at that time.

It may be admitted that the appellant's claim of set-off cannot be supported on the strict legal principles of set-off, in respect of mutual debts and demands; but the right of Innes to charge the appellant's life estate, and the appellant's right as against Innes, to direct payment of the charge out of what was due from him to the appellant on his private account, constitute a state of circumstances sufficient to maintain the appellant's claim in the nature of an equitable set-off; *O'Mahoney v. Dickson*,² *Beasley v.*

¹ See 14 Law Journal N. S. Chanc. 341.

² 2 Schoales & Lefroy, 400.

D'Arcy,¹ *Piggott v. Williams*,² *Williams v. Davies*.³ The Vice-Chancellor's order, disallowing the exceptions, and the Lord Chancellor's order, affirming it, must be reversed.

Supposing, however, but not admitting, that the appellant's exceptions were properly disallowed, it is clear that the orders complained of contain a fatal error, so far as it was declared by the former, and affirmed by the latter, that the sum of 10,460*l.* Bank annuities, belonged to the assignees of Innes. That sum arose from the accumulations of 8920*l.* Bank annuities, which were part of the *corpus* of the Bacolet estate, being a portion of the compensation money paid for the slaves thereon; whereas the charges on which the claim of Innes, and of his assignees in his right, depended, were limited, by the deed of 1812, to the appellant's life interest in the estate; therefore, under any circumstances, the assignees had *no right to have payment of *80 more than the dividends on the 8920*l.*, and that only during the life of the appellant.

Mr. J. Parker, and *Mr. Roundell Palmer*, for the respondents. The advances made by Innes, in respect of the Bacolet estate, were charges on that estate, and are not liable to be set off at law or in equity against the sum found due to the appellant from Innes on private dealings and transactions between them. It is essential to the doctrine of set-off that there should be cross demands between persons mutually indebted, and that the right of set-off should be mutual. It is not necessary to cite cases to support that doctrine. There was no mutual demand or mutual debt in this case. The appellant was not personally liable to Innes for the debt due to Innes, in respect of his advances as trustee and consignee of the estate; the estate was his only security; but Innes was personally liable to the appellant for the debt due on the separate account. There was no mutuality between those debts; there could be no set-off of one against the other. The mere existence of cross-demands is not sufficient to establish an equitable set-off, which is allowed only where the party seeking the benefit of it can show some equitable ground for protection against the other party's demand; *Whyte v. O'Brien*,⁴ *Rawson v. Samuel*.⁵ The exceptions to the Master's report were properly disallowed.

¹ 2 Schoales & Lefroy, 403 note.

⁴ 1 Simons & Stuart, 551.

² 6 Maddock, 95.

⁵ 4 Mylne & Craig, 380.

³ 2 Simons, 461.

The declaration in the Vice-Chancellor's order, affirmed by the order of the Lord Chancellor, that the 8920*l.* stock, set apart as the agreed value of the 8000*l.*, found due to Innes from the * 81 Bacolet estate, and the accumulations * of that stock, amounting to 10,640*l.*, belonged to the assignees of Innes, was founded on an order made in July, 1837, which is not appealed from. By that order, stock, equivalent in value to 8000*l.*, was carried over to "the contingent account," &c. of the assignees, and the dividends to accrue thereon were appropriated specifically to the payment of the debt due to Innes from the Bacolet estate, without prejudice to the claim of set-off then set up by the appellant, which claim has been since disallowed. Not only the appellant's life interest in the estate, but also the legacies charged on it in favour of those who were parties to the deed of 1812, were in equity liable for the advances made by Innes as trustee and consignee under that deed. The stock carried over to "the contingent account," &c. of the assignees, under the order of July, 1837, was liable to pay the debt so due to Innes. None of the persons interested in the Bacolet estate, except the appellant, complained of the orders of the Vice-Chancellor and Lord Chancellor.

Mr. Bethell, in reply, insisted that a clear case of set-off was established for the appellant. His bill put it thus: "give me up my estate, and retain out of my funds in your hands, what is due to you from it." —

LORD LYNDHURST. — If he had a right to set off one debt against the other, there would be an end of the question. The question is whether he had such a right. If an action had been brought by the appellant against Innes, Innes could not have set off against the debt claimed in that action the 8000*l.* found due to him from the estate.

Mr. Bethell. — Certainly not; because that would be a personal action, and there was no personal liability from the appellant to him.

* 82 * THE LORD CHANCELLOR. — The question is, whether the appellant, having a sum of money due to him, has a right to say to his debtor, the creditor of the estate, "Take the 8000*l.* out of the money you owe me."

LORD LYNDHURST. — Suppose we are of opinion that the exceptions to the report should be allowed, then what shape does the case take?

Mr. Bethell. — I am going to state to your Lordships the form of the order which I should humbly submit to your Lordships. First, I should state in a very few words what has been done. [Having read minutes of the order which he submitted for their Lordships' adoption, he proceeded.] These directions are exceedingly simple and plain. On the subject of costs, which is the only point on which the respondents' counsel could even raise a question, I should not propose to your Lordships to make any order.

THE LORD CHANCELLOR. — The defendant is entitled to his costs, — he is a mortgagee on the estate.

Mr. Bethell. — He is entitled to principal, interest, and costs.

THE LORD CHANCELLOR. — The cause will only be referred back with a direction.

LORD LYNTHURST. — Assuming that we shall be of opinion that the exceptions ought to have been allowed, the question is, what we ought to do upon that. Mr. Bethell's minutes are too long for me to repeat.

Mr. Bethell. — All I propose is, to reverse the order, overruling the exceptions; to allow the exceptions to the Master's finding that there was no right to apply the one debt in satisfaction of the other. Then there is nothing further to be done by the Master; there is no necessity for a direction to send that matter back.

* THE LORD CHANCELLOR. — The Master found that 8000*l.* * 83 were due for principal and interest.

Mr. Bethell. — Your Lordships will recollect that, instead of prosecuting the account of what was due upon the mortgage or charge, it was agreed that what was so due should be taken to be 8000*l.* The interest on that sum was provided for by the order of 1837, that it should carry such interest as that sum of money when invested in stock would produce. The value of 8000*l.* was set apart from the slaves' compensation money previously invested, and the dividends were to accumulate to answer the interest of the 8000*l.*, provided the debt of 8000*l.* should not be found to have been satisfied; but my contention is, that the 8000*l.* were to be regarded as satisfied, immediately after the direction was given to Innes to apply an adequate part of his debt of 11,884*l.* in discharge of it; therefore there will be no interest on the 8000*l.*

THE LORD CHANCELLOR. — That is from the filing of the bill.

You say the stock now invested meets the whole of the mortgage debt?

Mr. J. Parker, for the respondents, admitted that.

THE LORD CHANCELLOR. — Do you admit that the 8000*l.* invested represents the full amount, up to the present time, of the mortgagee's claim?

Mr. Parker. — Undoubtedly.

THE LORD CHANCELLOR. — Then you are paid by receiving that sum?

Mr. Bethell. — They are paid by wiping off 8000*l.* out of the 11,884*l.* The stock in Court, to the credit of the cause, was set apart to give them ultimate security for the 8000*l.*, in case it should be found it ought not to have come out of the 11,884*l.*

THE LORD CHANCELLOR. — That satisfies the mortgagee's * 84 * claim; then as to the mortgagor, there must be a declaration as to the amount of stock purchased with the 8000*l.* invested to meet the debt; there is nothing to refer back to the Master.

Mr. Parker. — You will find, according to the exceptions, the first of which is the substantial one, that they present a number of alternative propositions.

THE LORD CHANCELLOR. — Do you contend that it is necessary to refer them back?

Mr. Parker. — There will be this question, which I do not know that you have yet decided; that is, whether the whole of the Bacolet debt is to be considered as money that is to be separate estate of Innes?

THE LORD CHANCELLOR. — Yes; that is decided.

Mr. Parker. — If your Lordships have decided that, then the only question will be the question of set-off.

THE LORD CHANCELLOR. — That is going into the whole case. We are putting these questions, assuming that we are of opinion that the plaintiff has a right, as against the mortgagee, to say, "Take your 8000*l.* out of the 11,884*l.*, and restore me my estate," and that by the filing of the bill he did say so. My question first was, whether there was anything forming matter for inquiry — assuming the exceptions to be allowed, whether it is necessary to go back to the Master, or whether, allowing the exceptions, it is competent for the Court to dispose of the case on further directions? We have now decided the whole case, and the only question is this,

what form of order this House should draw up? whether you want any other form of order than is suggested. It turns upon this, whether there is any matter for a reference back to the Master; if not, then the matter is very clear.

Mr. Parker. — After the intimation your Lordships *have *85 given, I do not ask any reference back to the Master.

THE LORD CHANCELLOR. — You take the stock in full payment of your debt.

Mr. Bethell. — They (respondents) wipe off 8000*l.* out of the 11,884*l.*, in full payment of their debt.

Mr. Parker. — They (appellant) take the stock as it now stands, with the dividends which accrued upon it.

Mr. Bethell. — We take the whole of it —

THE LORD CHANCELLOR. — Do you claim to have restored to you the dividends of the 8000*l.*, between the times of the filing of the bill and of the investment?

Mr. Bethell. — Yes, certainly; because the debt of 8000*l.* for securing which that sum of stock was set apart, is now considered as paid by an equal sum out of the 11,884*l.* due to us.

THE LORD CHANCELLOR. — You say, and I think properly say, that you have a right to consider the debt was paid when you filed your bill. Then that fund, now existing, represents not only the mortgage fund, but a portion of the interest which accrued between the filing of the bill and the investment.

Mr. Bethell. — It is in this way. In 1837 we wanted to know the full amount of what was due to the mortgagee; it was found to be 8000*l.* both principal and interest; and a large sum of money had been paid into Court, arising from the slaves' compensation; the assignees said, "we require to have security for this 8000*l.*" We said, "we will give security, — take a part of the fund in Court, and let it be invested and held for your security." The fund in Court, therefore, was a security for the 8000*l.*

THE LORD CHANCELLOR. — There can be no especial *mat- *86 ter for a reference back to the Master. There will be a declaration that the plaintiff had a right to pay the mortgage debt out of the money due to him from Innes; then that being so, of course the order will be merely to restore the estate.

[After some discussion between their Lordships and the counsel on both sides, on the form of order proposed and read by Mr. Bethell.]

THE LORD CHANCELLOR. — The order will be, to reverse the two orders, and allow the exceptions to the Master's report.

Mr. Bethell. — And direct the costs paid by the appellant to be repaid ; there can be no objection to that on the other side.

THE LORD CHANCELLOR. — They would be entitled to the costs of suit as mortgagee. There is no doubt what is the right order to be made.

It was then *ordered and adjudged*, that the order of May, 1845, be reversed, and that the costs that were paid thereunder to the several respondents, be repaid by them respectively to the appellant. And it was further ordered, that the order of July, 1842 — so far as it held the exceptions taken by the appellant to the Master's report to be insufficient, and overruled them ; and so far as it ordered the appellant to pay the several defendants their costs of the said exceptions ; and so far as, on the further directions, it declared that the 10,460*l.* 6*s.* 11*d.*, 3 per cent. bank annuities, standing in trust in the causes, to "The contingent account of the defendants Palmer and Edwards, assignees of the defendant Innes, surviving partner of Winter," and the sum of 152*l.* cash, in bank, remaining to the credit of the said cause, to "the like account," belonged to Palmer and Edwards, as such assignees, without prejudice to any question between the said Innes and the partnership — be reversed, and that the deposit mentioned in the said 87 * order of 1842, and the costs which have * been paid thereunder to the several respondents, be repaid by them respectively to the appellant. And upon the matter of the said exceptions it was declared, that the appellant was entitled to have the sum of 8000*l.*, at which the claim of Palmer and Edwards, as assignees of Innes, in respect of his advances on account of the Bacolet estate, had been ascertained and settled as mentioned in the Master's report, paid and satisfied by the application of a sufficient part of the 11,884*l.*, found and appearing by the said report to have been due from Innes to the appellant, in respect to the dealings and transactions therein mentioned, and that the same sum of 8000*l.* was to be considered and treated as having been paid and satisfied accordingly ; and that the appellant having thus paid the said debt or sum of 8000*l.*, was entitled to have transferred to him the sum of 12,756*l.* 17*s.* 4*d.* bank annuities, then standing to the credit of the account entitled, "The contingent account of the defendants T. Palmer and E. Edwards, assignees of the defendant Innes, surviving partner of N. Winter," being the amount which had been produced by the investment of the 8000*l.*, set apart in pursuance of the Master's report, dated the 3d June, 1837, and of the dividends which accrued in respect thereof. And it was therefore further ordered, that the same be transferred and paid accordingly. And it was further ordered, that the cause be remitted back to the Court of Chancery, to do therein as should be just and consistent with this declaration and judgment.

(The order is set out more fully on the Journals for 1848, vol. 80, p. 717, where the title of the case is, *Baillie v. Palmer and others* ; but as Mr. Palmer died before the appeal was argued, the name of the surviving assignee is substituted for his in the report.)

* SAWARD v. McDONNELL.

* 88

1847. April 22; May 17. 1848. August 4.

MICHAEL SAWARD and Wife, *Appellants*.FRANCIS McDONNELL and Wife, *Respondents*.*Marriage Settlement. Power of Appointment. Construction.*

R. P., being entitled to one-third share of real and personal estates, settled such share upon her marriage, with power of appointment to herself (in events that happened) over one-third part thereof, by deed or will, and over the other two-third parts by will, subject to the husband's life interest therein, and in default of issue of the marriage. R. P. becoming entitled to a moiety of another third share of the same estates, settled it to such uses as she should appoint, subject to the husband's life interest. There was one child of the marriage.

R. P. by her will devised, bequeathed, and appointed "all that one-third part of her real and personal estates, over which she had a disposing power," upon trust, immediately after her death to raise a sum of 500*l.*; and "as to the residue of the said one-third part, and the remaining two-third parts," she gave the same to her husband for life, remainder to her infant son, and his heirs; but in case he should die under twenty-one, without issue, she directed the residue of the said one-third part to be sold, for payment of an annuity and legacies given by her will, — the annuity to be payable upon the son's death, and the legacies as soon as the said one-third part could be sold; — and as to the remaining two-third parts, subject to her husband's life interest, she gave and appointed them to her sister absolutely. The son survived the testatrix, and died under twenty-one without issue: —

Held, that the appointment of the "one-third part" for payment of the annuity and legacies, extended only to one ninth of R. P.'s original third share, and to one third of her moiety of the other third share.

2. That the annuity and legacies became payable on the death of the son, with interest on the legacies from that time.
3. That the will did not affect the husband's rights under the settlement, and no case of election was raised against him.

RHODA PROTHERO, before her marriage with Colonel William Pearce, in February, 1826, was, under the * wills of * 89 Thomas Prothero, her father, and Samuel Browne Prothero, her brother, and by various conveyances, and in the events which had happened, entitled in possession to one equal undivided third part or share of all their real and personal estates. The other two

undivided third parts or shares belonged to her two sisters, Mrs. McDonnell and Mary Prothero.

By articles in writing, dated the 1st of February, 1826, entered into prior to the said marriage, between the said William Pearce of the first part, Rhoda Prothero of the second part, and Thomas Oakley and William Addams Williams of the third part, it was agreed that the said one-third share should be settled upon trusts, as therein mentioned.

By an indenture of release, dated the 13th of May, 1826 (grounded on a lease, dated the 12th), and made between W. Pearce and Rhoda, then his wife, of the one part, and Oakley and Williams of the other, after reciting the said articles, it was witnessed that, in pursuance thereof, and in consideration of the said marriage, W. Pearce and Rhoda his wife conveyed all that one equal third part or share, and all other share and interest (if any) of which she was seised or to which she was in any wise entitled at the time of the execution of the said articles and of her marriage, of and in the freehold estates in the first part of a schedule thereto mentioned; and also of and in all other freehold hereditaments whereof or wheretò she was, at the time aforesaid, seised or entitled for any estate in possession, reversion, or expectancy, to Oakley and Williams, their heirs and assigns (subject to all charges affecting the same) upon the trusts thereafter mentioned: And W. Pearce thereby covenanted, for himself and his said wife, to levy a fine of her share of the freehold premises * 90 (which was afterwards * levied), and to surrender her third part of the copyhold premises (mentioned in the second part of the said schedule), to the uses of the said trustees, and on the same trusts: And he and his wife thereby assigned all her personal estate to which she was entitled at the time of her marriage, under the wills of her father and brother, or otherwise, unto Oakley and Williams, their executors, &c. upon the trusts thereafter mentioned: And it was declared that they should stand seised of the said one equal third part or share of the said freehold and copyhold premises, upon trust, as to such parts thereof as were agreed to be sold, to complete or abandon the contracts for them, and, as to the remainder, and also such parts as were comprised in the contracts for sale, if they should be abandoned, to concur with the persons for the time being entitled to the other two-third parts, in making partition of the same, or selling or mortgaging

them, and to hold the monies to be raised by partition, sale, or mortgage, and to arise from the said personal estate, upon such trusts as should be declared concerning the same respectively by another indenture.

By that other indenture, dated the same 13th of May, and made between the same parties, after reciting to the effect aforesaid, it was declared that Oakley and Williams, their heirs, executors, &c. should stand possessed of the monies to arise by partition, sale, or mortgage of Rhoda Pearce's said one-third share of the said real estates, and to be received from the said personal estate, on trust to vest the same in lands, or on government or real securities, and settle the same to such uses as W. Pearce and Rhoda his wife should jointly appoint, *and in default of such joint appointment, "then, as to one equal undivided third part or * share * 91 of and in the same premises,"* to such uses as Rhoda Pearce should by deed or will appoint; *"and as to the other or remaining two undivided third parts or shares,"* and also as to the said one-third part, in default of such last-mentioned appointment, to the use of W. Pearce during his life or until his insolvency; with remainder, in case of the determination of W. Pearce's estate therein during his life and the life of his said wife, to the said trustees, for her separate use during the life of W. Pearce; with remainder after his death to the use of the said Rhoda for life if she survived; with remainder to their children, as therein mentioned; and if there should be but one child, then, as to the entirety of the said messuages and other hereditaments, to the use of such only child, and his or her heirs or assigns; with remainder, in default of such issue, to Rhoda in fee, in case she survived her said husband, but if she should die in his lifetime, then to such uses as she should by will appoint; with remainder to her right heirs.

No partition or sale was made of the real estates.

Mary Prothero (sister of Rhoda Pearce) died in February, 1826, having by her will, dated the 1st of that month, given and devised all her real estate to the said Addams Williams (whom she appointed her executor) for the term of five hundred years; upon trust, by sale or mortgage, to raise thereout and out of her personal estate the sums of 5000*l.*, 750*l.*, and 2000*l.*, for purposes therein mentioned, and, subject to the said term and the trust, she devised all her real estate to her sisters, Ann McDonnell and

Rhoda Pearce (then Rhoda Prothero), their heirs and assigns, as tenants in common; and as to her personal estate, she gave 300*l.* to

Rhoda Pearce, and the residue to her and Ann McDonnell.

* 92 * W. Pearce and Rhoda his wife, and F. McDonnell and Ann his wife, levied a fine unto John Williams, of the real estates so devised by Mary Prothero: And by an indenture dated the 1st of August, 1826, made between W. Pearce and wife of the one part, and J. Williams of the other, it was declared that the fine should enure, as to the moiety of Rhoda Pearce in these estates, to such uses as W. Pearce and Rhoda his wife should jointly appoint; and in default of such appointment, to the use of W. Pearce for his life, and after his death, to the use of Rhoda his wife for her life; with remainder to such uses as she should by deed or will appoint; and in default of such appointment, to the use of her right heirs. The property comprised in this indenture consisted of one equal sixth part of the real estates of Thomas and Samuel B. Prothero.

The joint powers of appointment reserved to W. Pearce, and Rhoda his wife, by the deeds of the 13th of May and 1st of August, 1826, were never exercised.

Rhoda Pearce died in September, 1827, leaving William Prothero Pearce, her only child and heir at law. By her will (after stating that she did thereby, in pursuance of the powers in her vested by the said two indentures, and of all other powers in her vested or in any wise enabling her in that behalf, and in exercise and execution thereof, declare her last will) she gave, devised, and bequeathed, limited and appointed, "all that one-third part" of her messuages, hereditaments, and premises, "and also all that one-third part" of her personal estate and effects, unto the said William Addams Williams, his heirs, executors, &c. upon trust, immediately after her death, by sale or mortgage "of all or

* 93 any * part of the said one third of her real and personal estate, over which she had a disposing power," to raise the sum of 500*l.*, and pay the same to her husband, for the purpose therein mentioned; and after the payment thereof, "then as to the residue of the said one-third part of her real and personal estate, and also as to the remaining two-third parts thereof," subject as thereafter mentioned, she limited and appointed, gave, devised, and confirmed the same unto her said husband, to hold

to him and his assigns for his life ; and after his death, she gave, devised, and bequeathed, limited and appointed the said messuages, hereditaments, premises, and real estate, and all her personal estate and effects, unto her infant son W. Prothero Pearce, to hold to him, his heirs, and assigns ; provided, nevertheless, that in case of his death during her lifetime, or before he should attain the age of twenty-one years, without leaving issue, then as to one-third part of the said messuages, hereditaments, and premises which she had devised and bequeathed unto W. Addams Williams in trust as aforesaid, and subject thereto, she directed that the said one-third part, or so much thereof as might remain after raising the 500*l.*, might be sold, and that the monies arising therefrom might be received by W. Addams Williams, and be by him applied in discharge of the annuity and legacies thereafter by her given. The testatrix then gave and bequeathed unto her mother, for her life for her separate use, an annuity of 100*l.*, to be paid quarterly, the first payment to be made on the first quarter-day next after the death of her said infant son ; and she directed that the sum of 2000 guineas, part of the monies to arise by the sale before by her directed to be made, be vested in government or real security, to pay the * said annuity ; and after the death of her * 94 mother, she gave the 2000 guineas to one Thomas Prothero absolutely. And she bequeathed to the appellant, Michael Saward, the sum of 1000 guineas, unto Ann Lewis 100*l.*, unto W. Addams Williams 100*l.*, and unto her said husband 2500*l.*, which said annuity and legacies she directed should be paid by her executor as soon as the “ said one-third part of her said real and personal estates could be sold and disposed of, and the monies arising therefrom could be received ” ; but if such monies should prove insufficient to pay the annuity and legacies, she directed that the same should be abated equally in proportion : And “ as to the remaining two-third parts of her said real and personal estate, subject to her said husband’s life estate therein,” she directed and appointed, gave, devised and bequeathed the same to her sister Ann McDonnell, wife of F. McDonnell, her heirs, executors, &c. And the testatrix declared her will to be that in case her said infant son should survive her and live to attain the age of twenty-one years, then, after raising the 500*l.* for her husband as before directed, she revoked the appointment of the residue of the said one third of her real and personal estate, and the annuity and

legacies directed to be paid therefrom, and also the appointment and devise of the remaining two-third parts of her said estates to Ann McDonnell, and she confirmed the estates and interests before appointed, devised, and bequeathed to her husband for his life, and after his decease to her said son, his heirs, executors, &c.

W. Addams Williams, who was appointed sole executor in the will, having renounced probate, administration with the will annexed was granted to W. Pearce, the husband of the testatrix.

* 95 * W. Prothero Pearce, the son, died in 1828, at the age of four or five months, leaving the said Ann McDonnell, his heiress at law, who was also the heiress at law of Mrs. Pearce.

By an indenture dated in June, 1832, the legacy of 1000 guineas given by the said will to Michael Saward was assigned to Thomas Weatherall and Thomas Welch, upon certain trusts, for the benefit of Saward and his wife and their children.

The bill, which led to this appeal, was filed in 1833 by Saward and his wife, and the said trustees, against the said F. McDonnell and Ann his wife, W. Pearce, T. Oakley, W. Addams Williams, and others, as defendants thereto. The bill, after stating the said several indentures, and will, and other matters before mentioned, made a case to the effect that the legacies given by the will was thereby charged on one third of all the real and personal estates of the testatrix, and prayed (amongst other things) that the will and appointment of Rhoda Pearce might be established, and the trusts thereof carried into execution; and that an account might be taken of what was due to the plaintiffs on account of the legacy of 1000 guineas; and that an account might also be taken of the real and personal estates which passed by the said will or appointment, and what part thereof had been possessed by, or by the order or for the use of, the defendants, F. McDonnell, W. Pearce, T. Oakley, and W. Addams Williams, or any of them, and of the rents, profits, and interest thereof, which had accrued since the death of W. Prothero Pearce, and what parts thereof had been possessed or received by, or by the order or for the use of, the said defendants or any of them; and that they might be

* 96 * decreed to pay what should be found due from them respectively; and that the said one-third part or share of Rhoda Pearce of the said real and personal estates might be sold, and

that the sum found due on account of the legacy of 1000 guineas and the interest thereon might be paid to the plaintiffs Weatherall and Welch, upon the trusts of the settlement made on the marriage of the plaintiffs Michael Saward and Harriette his wife.

F. McDonnell and his wife, by their answer to the bill, said certain accounts relating to the trust property had been settled by and between them and W. Pearce and Rhoda his wife, and others; and that in August, 1830, W. Pearce agreed to sell, and by indentures of that date, did, in consideration of 3500*l.*, convey and assign all his estate and interest in the real and personal estates, late belonging to Rhoda Pearce, deceased, (except certain trifling articles,) unto F. McDonnell. They submitted to the judgment of the Court the construction and effect of the said indentures of May and August, 1826, and of the said appointment of Rhoda Pearce; and also, whether the legacy of 1000 guineas became payable at the death of W. Prothero Pearce, or only at the death of W. Pearce.

W. Pearce, by his answer, stated that he claimed no right or interest in the said trust property, he having disposed of all his interest therein to the other defendants.

The cause was heard by the Master of the Rolls in December, 1838, when his Lordship declared that the appointment of Rhoda Pearce extended over one-third part of the whole of the property included in the indentures of the 13th of May and 1st of August, 1826; that the legacies and annuity given * and * 97 bequeathed by the will of Rhoda Pearce, became payable on the death of her son W. Prothero Pearce, and that W. Pearce, her husband, having elected to take under her will, was bound to confirm it. And it was referred to the Master to take an account of the legacies given by the said will, and compute interest thereon at 4*l.* per cent. from the end of a year from testatrix's death, and also to take an account of the arrears of the annuity given by the will from the death of the testatrix's infant son. And it was referred to the Master to inquire and state to the Court of what the property consisted which was subject to the said appointment, having regard to the above declaration, and what had been received in respect thereof by F. McDonnell and the other defendants, or any of them: and the Master was also to inquire and state whether the said one-third part was subject to any, and, if any,

what charges, and in whom such charges were vested. The consideration of further directions and of the payment of plaintiff's costs was reserved.

F. McDonnell and Ann his wife, W. Pearce, and other defendants in the cause, appealed to the Lord Chancellor against so much of the decree as declared that the appointment of Rhoda Pearce extended over one third of the whole of the property included in the indentures of the 13th of May and 1st of August, 1826, and that W. Pearce having elected to take under her will, was bound to confirm it, and as directed the Master to compute interest on the legacies given by Rhoda Pearce, at the rate of 4l. per cent.

per annum, from the end of one year from her death, and as *98 directed the Master to inquire and state of what the * property consisted which was subject to the said appointment, having regard to the said declaration.

THE LORD CHANCELLOR, on the rehearing of the cause in June, 1839, ordered that the said decree be varied by a declaration that the appointment or will of Rhoda Pearce extended only over the one-third part of her property comprised in the settlement of the 13th of May, 1826, over which one third she had a power of appointment expressly reserved to her by the said settlement; and also over the whole of her property comprised in the indenture of the 1st of August, 1826, subject nevertheless to the estate for life reserved to her husband, W. Pearce, in the property comprised in the last-mentioned settlement; and that the annuity and legacies were charged on one third only of the property so appointed; and by striking out so much of the decree as regarded the election of the husband; and also by directing that the interest on the legacies bequeathed by Rhoda Pearce should be computed from the death of W. Prothero Pearce, with other directions consequential to the said declaration.

The effect of these alterations of the decree of the Master of the Rolls was—as the parties to the cause understood it—to charge the annuity and legacies only on one twenty-seventh part of the real and personal estates originally belonging to Thomas Prothero and Samuel B. Prothero immediately, and on one-eighteenth part of the same real and personal estates in reversion, after the death of W. Pearce.

The appeal was brought against so much of the decree as proposed the alterations.

* *Mr. Kindersley* and *Mr. Torriano*, for the appellants: * 99
The only question in this appeal is, how much of the real and personal estates of the original owners, Thomas and Samuel Browne Prothero, the father and brother of Mrs. Pearce, was affected by the appointment contained in her will. The conflict between the decisions of two eminent Judges upon the extent and effect of that appointment, and of the power in exercise of which it was made, raised an additional difficulty in the case. The Lord Chancellor held that only one ninth of Mrs. Pearce's original third share, and one sixth of her moiety of her sister's third share — equal to one twenty-seventh and one-eighteenth parts of the whole real and personal estates — were affected by the appointment for payment of the annuity and legacies. That appears, from a note on counsel's brief, to have been the effect of his Lordship's construction of the two indentures of the 13th of May and 1st of August, 1826, and of the terms of the appointment. The Master of the Rolls was of opinion that the full one third of the whole property comprised in both indentures was appointed for the payment of these charges.

The appellants submit that the construction of the Master of the Rolls was right. In the events which happened, and which were provided for in the indentures of settlement, Mrs. Pearce had power, first, under the indenture of the 13th of May, 1826, to appoint, by deed or will immediately, one third of her share, that is, one ninth of the whole of the real and personal estates, formerly of Thomas and Samuel B. Prothero, and the remaining two thirds of her share, equal to two ninths of the whole of the said estates, subject to the life interest given by that indenture to her husband. * She had also power under the indenture * 100 of the 1st of August, 1826, to appoint a moiety of Mary Prothero's third share, — equal to one sixth of the whole of the same real and personal estates, — subject to her husband's life estate therein under the indenture of the 13th of May. That being, upon the plain construction of these instruments, the extent of the powers thereby reserved to Mrs. Pearce, it became necessary in the next place, to examine the will, and see whether she did not thereby exercise the powers to their full extent. There could be

no doubt that she intended to do so. It could not be supposed that she would charge the annuity for her mother, and the legacies for the appellant and for her husband and others, on property manifestly insufficient, when she had power over property fully adequate, consisting, altogether, of the moiety of the large real and personal estates of her father and brother. The contrary construction is erroneously inferred from some forms of expression used by the testatrix. By the expression in her will, "all that one-third part of my real and personal estate, over which I have any disposing power," on which the respondents rely, she must be understood as meaning one third of the whole of the real and personal estate, in which she had an interest under the indentures of May and August, 1826, and not one third of the one third of the estates comprised in the indenture of May. And in speaking of "the remaining two third parts thereof," she must be understood to refer to the entire residue, after the application of one third of the real and personal estates over which she had power of appointment, and not as intending to speak of only that portion over which she had such power under the indenture of the 1st of August.

* 101 *The petition of appeal also complained of that part of the Lord Chancellor's decree, which declared that no case of election was raised on the will against the husband. The appellants on further consideration were disposed to submit to the Lord Chancellor's striking out that passage from the decree of the Master of the Rolls; they complained only of so much of his Lordship's decree as declared that the appointment in favour of the legatees extended to one ninth part only of the property comprised in the indenture of May, 1826, and not to one third, as was held by the Master of the Rolls—that was the substance of the difference between the two decrees—they also acquiesced in the direction that the interest on the legacies should be computed from the death of W. Prothero Pearce.

[THE LORD CHANCELLOR observed that there was a rehearing of the appeal before him on the minutes. He was of opinion that the power of appointment could only operate on one ninth of the whole property, and he explained to the parties that the Master of the Rolls must have meant that. The appellants, on seeing him concurring in the decree of the Master of the Rolls, then said they were entitled to more than either of the decrees gave them.]

Mr. Turner, counsel for the respondents, said, they always understood his Lordship's decree to be that only one ninth of the property comprised in the deeds of May, 1826, was appointed to pay the annuity and legacies.

Mr. Kindersley. — That construction is impossible. The question is, whether the annuity and legacies are not charged on one third of the whole of the estates comprised in the deeds of May and August 1826.]

* *Mr. Turner* and *Mr. Hodgson* (with whom was *Mr. James Campbell*), for the respondents : — *102

The sole question in the case is, whether *Mrs. Pearce's* appointment applied to more than one twenty-seventh and one-eighteenth parts of the whole property left by her father and brother. She, being a married woman, could not appoint any part of that property, except in virtue and exercise of powers vested in her by the indentures of settlement. She was by the first of them enabled to appoint one third of her original share. The appointment executed by her in favour of the annuitant and legatees, as the terms used by her manifestly show, extended only to one third of that one third, and to one third of her moiety of her deceased sister's third share. The remaining two thirds she appointed in favour of her husband for life, and of her son in fee ; and in the event of his death, under twenty-one, without having issue, then in favour of *Mrs. McDonnell*. But the son having survived his mother, the two thirds, whether well appointed or not, vested in him, and on his death passed to *Mrs. McDonnell*, his heiress at law. *Doe v. Perryn*,¹ *The King v. The Marquis of Stafford*,² *Doe v. Smeddle*,³ *Tarback v. Tarback* — a decision by Lord Cottenham at the Rolls in 1835, and stated by *Mr. Jarman* in his *Treatise on Wills*⁴ — and *Ellicombe v. Gompertz*.⁵

It was not necessary to enter into the question of election against *Mrs. Pearce's* husband, as the appeal on that point was abandoned. His rights under the *settlement were *103 not in the least affected by the will, and therefore no case of election could arise.

¹ 3 Term Rep. 484.

⁴ Vol. 2, p. 375.

² 7 East, 521.

³ 3 Mylne & Craig, 127.

⁵ 2 Barnewall & Alderson, 126.

Mr. Kindersley in reply, said, that after the observations of the Lord Chancellor, it was clear that his Lordship's opinion and judgment were in favour of the claim of the appellants, though the decree was against it. The cases referred to on the other side had no application to this case. It would now seem that the appeal was not really against the Lord Chancellor's judgment, except on the case of election, in which the appellants admit that the decree of the Master of the Rolls was erroneous. Some prejudice was, perhaps, raised by that determination at the Rolls against the other parts of the case of the appellants in the Lord Chancellor's Court.

The Lord Chancellor said he would search for his notes of his judgment in the Court of Chancery, before the House gave judgment on the appeal.

August 4.

LORD BROUGHAM. — This is an appeal from a decree of the present Lord Chancellor; and upon looking into the case, my opinion is in favour of that decree, and against the decree of the Master of the Rolls, which the Lord Chancellor altered in its most material particulars. I have my Lord Chancellor's authority to state that, after having reconsidered the case, and heard it argued, he retains his original opinion. So that here we both agree. No other noble and learned Lord was present at the argument.

By a settlement of the 13th of May, 1826, between William Pearce and Rhoda his wife, of the one part, and Thomas Oakley and William Addams Williams, of the other part, after the recital of one-third share of certain freehold and copyhold hereditaments being * hers, it is stated that one-third share of the * 104 said freehold and copyhold hereditaments should be put in settlement, and then she, being a married woman, could, of course, have no power or right to make a will during coverture, by reason of the coverture, unless in so far as it was made in execution of the power which was given to her by the settlement; and the question arose as to what that power entitled her to do.

The power was, first, a joint appointment by the husband and wife, standing in that relation, during the coverture, and in default of such joint appointment, "then as to one equal undivided third part or share of and in the same premises." Now every thing

turned upon whether "of and in the same premises" was to be taken as being of and in one-third part of and in the same premises which were in the settlement, together with the subsequent settlement; or whether it was not confined to the last antecedent "of and in the same premises, one-third part of the estate," namely, which was conveyed under the marriage settlement? The Master of the Rolls thought that it extended over one third of the whole property. My Lord Cottenham, then Chancellor, thought that it extended over only one third of that third, and not over one third of the whole estate in settlement.

My Lords, this is not a case which admits of any very great dissertation, upon either principle or authority; it turns upon the mere construction of that short clause in the settlement. Upon the whole I am very clearly of opinion, that there was a miscarriage at the Rolls, and that instead of one third of the whole, she only had the power of appointment over a third of that third; and her will was confined to that power; of course, her only authority being that power,—and in *execution of that *105 power alone did she make that will,—and that power was confined to one third of that which was in the settlement, namely, one third of the one third.

I am also of opinion that the doctrine of election, namely, that the husband taking under the will should be put to his election, was not applicable to this case, and that it was rightly struck out from the decree by the Lord Chancellor when he gave his judgment.

There are cases a great deal stronger than this, with respect to the words used, but it is unnecessary to trouble your Lordships with them, as my noble and learned friend sees no reason to alter his original opinion, and as I have no doubt whatever that the first decision below was erroneous,—that the second decision was right, and that therefore the second decision should be affirmed by your Lordships.

I do not know whether, in this case, costs were reserved below.¹ The respondent, for whom we give judgment, must have the costs of this appeal, at all events. I do not know what was done with the costs at the Rolls. Nothing can be done to alter the costs

¹ Vide *supra*, p. 97.

there, because the present appellant was in possession of the judgment there; but the respondent must have his costs of this appeal.

Mr. Pocock, solicitor for the appellant,—his counsel being absent,—said that all the costs were to be paid out of the fund in the cause.

LORD BROUGHAM. — It may be all very well to make the fund sometimes pay the costs up to a certain point, but it does
 *106 not follow that it is to pay the costs eternally: — * for instance, it does not follow that the fund is to be charged with the costs of this appeal. We do not consider that right; indeed we set our faces against it, though it is often urged by learned counsel, when there is a conflict of opinion in the Courts below, the Lord Chancellor reversing the decision of the Master of the Rolls or Vice-Chancellor, that there should be no costs given of the appeal. But every case must depend upon its own special circumstances. Therefore, I should say, that unless something should be urged to show that the costs of this appeal should be thrown upon the estate, they must be paid by the appellants. It does not at all follow that the party who might be justified in taking the opinion of the Superior Court below, ought not to be satisfied with that opinion. It appears that the case had been very well considered below. I am very much afraid of breaking in upon our rule, of generally giving the costs upon an appeal to the party who succeeds. The appellants may, if they think fit, make an application to the Lord Chancellor, in the course of next week, but, as at present advised, I should recommend to your Lordships to give the costs of the appeal, unless some cause be shown to the contrary, because, it is one thing to say, “Let the estate pay the costs of taking the opinion of the Court once, or twice even,” but it is a totally different thing to say, “Let the estate be saddled with the costs up to the very last moment, to which litigation can be carried on.”

Mr. Hodgson. — In this case, there can be no pretence for any alteration in the rule as to costs. The appeal must be dismissed, with costs, especially as the case was reheard twice below before the Lord Chancellor.

*107 * LORD BROUGHAM. — If there were two rehearings, I

should not hesitate for one moment. We affirm the decree generally, with the costs of this appeal. The former costs being thrown upon the estate, there is no dispute about them; but we give the costs of this appeal to the respondents, unless the appellants shall, before this day week, make application to the contrary, any morning that the Lord Chancellor sits here.

The decree of the Lord Chancellor was accordingly affirmed, with costs.

1847. June 25, 28. 1848. July 10; August 21.

ROBERT HARRISON, *Plaintiff in error.*

WILLIAM STICKNEY and others, *Defendants in error.*

Retrospective Rate. Statute.

There is no rule of law which prohibits a retrospective rate.

In every case of rating the question is, whether the act under which a rate is made, either expressly or impliedly, prohibits such rate from being retrospective.

The 2 W. IV. c. 50 (public local) for draining the lands of Holderness, in the East Riding of the county of York, contains no prohibition against a retrospective rate. The commissioner under that act borrowed money (on which interest became due), for the purposes of the works directed by the act:—

Held, that a rate made to pay off the debt thus incurred was, under the provisions of that act, a valid rate.

THIS was an action of replevin, and the plaintiff in error was the plaintiff below. The defendants avowed under the authority of the Act of the 2 Wm. IV. c. 50. The defendants replied *de injuria*, and the question was, whether the distress made by the defendants, under the circumstances hereinafter mentioned, was lawful.

By the forty-ninth section of this Act of Parliament, the commissioner mentioned in it was authorised to enter into the lands and grounds within the limits of the said Act, and to adjudge and determine what lands should be deemed and taken to be low lands and liable to contribute to the expenses of the drainage thereof,

and to cause a map to be made of such lands, expressing
 * 109 the names of the owners, and the * quantities in acres, roads, and perches of the same, belonging to each several and respective owner. The determination of the commissioner on this point was made subject to an appeal to the Quarter Sessions for the East Riding of the county of York, which appeal was to be made within a time therein mentioned. The fiftieth section enacted, that "after the expiration of the time [for making the appeal, and after any alteration was made consequent upon such appeal, the commissioner should and might proceed to assess, tax, and charge all the low lands and grounds, and the owners and occupiers thereof, with such *gross sum and sums of money* as he should from time to time find necessary and requisite for defraying the charges and expenses attending the obtaining of the act, and carrying the same into execution, and to assess and rate every owner and occupier of the low lands and grounds by an acre rate, with such share, part, and proportion of such gross sum and sums as should be in proportion to the number of acres, which each such owner or occupier had or was reputed to have of and in the said low lands or grounds." The commissioner was to give twenty-one days' notice in writing of such tax to be made, and of the time appointed for payment, and, in case of neglect to pay within such twenty-one days, he was authorised, by warrant, to levy the sum by distress.

By the fifty-first section, the commissioner and certain valuers named in the act were required to make a true valuation of the said low lands and grounds in their then present state; and by the fifty-second section the said commissioner and valuers were required, as soon as in the judgment of the commissioner the drainage and works necessary for effecting the same were
 * 110 perfected and completed, again to view and make * a second valuation of the said low lands and grounds in their drained and improved state.

By the fifty-third section, when and as soon as the said second valuation was completed, so that the real improvement of the lands and grounds belonging to each owner and proprietor by means of the said drainage might be fully ascertained, by a comparative view of the said two valuations, the commissioner and valuers were required by some instrument in writing under their hands, to set forth the names of all the owners of the said low

lands, and the quantity of acres belonging to each, and the improved value of such lands, and in and by the same instrument to proceed to tax the said lands and owners according and in proportion to the improved value, with each owner's respective *quota* or portion of the costs, charges, and expenses attending the obtaining the Act, and carrying the same into execution, up to the time of the completing such instrument. And in case the *quota* or portion of any owner as so assessed and taxed should exceed the sum with which such owner should have been taxed by virtue of the previous powers and authorities, that then such persons should, within twenty-one days after notice of such excess, pay the same to the commissioner, and in case of default in payment of such excess, the commissioner was authorised to enforce payment by the same means as other taxes were therein directed to be recovered; and the commissioner was further required to pay and apply such excess, when paid as aforesaid, in paying and refunding to such other of the said proprietors, such sum as they had paid over and above what was their respective *quotas* and proportions as assessed and taxed by the said commissioner and valuers should amount unto, and in case the monies * which * 111 should be raised for such excess should not be sufficient to refund to the said last-named owners what they should have overpaid, then such deficiency should be made good to them out of the next assessment of taxes that should be made under the act.

The fifty-fifth section provided, that after the last-mentioned assessment, the commissioner should cease to be a commissioner, and the owners of the said lands were authorised to appoint trustees for the purpose of carrying the said act and certain other acts therein recited, into execution; and by the fifty-seventh section, the trustees were authorised thereafter to tax the owners of the said lands proportionately, according to the tenor of the last instrument, with such further sums as they should from time to time judge necessary, for defraying the expenses of repairing and maintaining the works, and any improvements which might from time to time be found necessary, and the salaries of officers and other incidental causes.

By the fifty-ninth section, the tenants were authorised to deduct out of their rents the amount of the rates paid by them; by the sixtieth section, unoccupied lands were to remain a security for

the assessments ; and by the sixty-first section, tenants for life were enabled to borrow money on the security of their land.

The seventy-third section enacted, that no order, &c. made by any justice, nor any by-law, rule, order, or other proceeding, to be made or had by or before the said commissioner, by virtue of the powers granted by the said act, should be quashed or vacated for want of form only ; and the seventy-eighth section enacted, that where any distress should be made for any sum of money to be levied by virtue of the act, the distress itself

* 112 * should not be deemed unlawful nor the parties trespassers on account of any defect or want of form in the summons, conviction, warrant of distress, or other proceeding relating thereto, nor should the party distraining be deemed a trespasser *ab initio* on account of any irregularity which should be afterwards committed, but the person aggrieved by such irregularity should recover full compensation for such special damage by an action on the case.

The commissioner appointed by the Act was William Stickney, one of the defendants, and he and two other persons, Godfrey Park and Cornelius Collett, were appointed by the act valuers ; and they continued to fill these offices until the completion of the drainage. Soon after the passing of the act, Stickney adjudged and determined what lands ought to be deemed and taken to be low lands, and after the time limited by the act for the appeal, he, on the 26th of November, 1833, assessed upon each owner and occupier an acre rate of 2*l.* per acre, the amount of which rate was 23,178*l.* 13*s.* 6*d.* This sum was fully paid.

After the making and completing of this survey, a valuation of the lands in their then state was made. The commissioner made no further gross or acre tax, but opened an account with a banker, and borrowed at interest, from time to time, such sums of money as he alleged were necessary.

On the 28th October, 1837, Stickney, Park, and Collett, by an instrument of that date, which recited that in the judgment of Stickney the works of drainage, and all works necessary for effecting the same, were completed, made a second valuation of the said low lands and grounds, according to their then improved value, in alleged pursuance of the fifty-second section of the act.

*113 * By an instrument dated the 12th of January, 1838, Stickney, Park, and Collett set forth the names of the

owners of the said low lands, the quantity of acres belonging to each, and the improved value of such lands, and imposed a tax on the lands in proportion to their improved value, with each owner's portion of the entire costs and charges incident to the passing of the act, and carrying the same into execution up to the date of the instrument.

In this assessment every person was assessed with the full amount of his share of the whole expenditure, according to the improved value of his land, and no mention was made or credit given for the previous acre tax. No owner or proprietor had overpaid by the acre rate his *quota* or portion of the expense of the drainage, and works thereof, and there was consequently no excess, as contemplated by the fifty-third section, to be recovered, distrained for, or paid over. The sum of 88,027*l.* 10*s.*, required by this assessment to be raised, included all the money borrowed, and interest upon it, to the amount of 7000*l.* odd.

By a notice dated the 24th of January, 1838, the said William Stickney gave notice to the plaintiff that he, the said William Stickney, and the said valuers, had assessed all the said low lands and grounds, containing in the whole 11,515*a.* 1*r.* 29*p.*, with the costs and charges incident to and attending the obtaining the said Act, and carrying the same into execution, and which amounted to the said sum of 88,027*l.* 10*s.*, and that the *quota* or portion thereof payable by the said plaintiff was 5351*l.* 15*s.* 6*d.*, from which was to be deducted the sum of 1202*l.* 13*s.* 6*d.*, being the gross or acre tax, which had been previously paid in respect of his lands, leaving a sum of 4149*l.* 2*s.* to be paid, which * he, the said William Stickney, ordered to be paid to *114 certain bankers on the 28th day of February, 1838. The money in question was duly demanded, and not being paid, a distress was issued for it, and then this replevin was brought. The cause was tried before Mr. Justice Coleridge, who thought that the commissioner had no right to make the rate of October, 1837, and that the distress was therefore illegal. The defendants tendered a bill of exceptions to his Lordship's direction, which was argued before the Court of Exchequer Chamber, which overruled the judgment of Mr. Justice Coleridge, and gave judgment for a *venire de novo*. The plaintiff then brought the present writ of error.

The arguments were heard in the presence of the following Judges: Lord Chief Justice Wilde, Justices Coleridge, Coltman,

Maule, Cresswell and Erle, and Barons Parke, Alderson, Rolfe and Platt.

Mr. Martin and *Mr. Crompton* for the plaintiff in error. — The proceedings of the commissioner here have been irregular and invalid, and the judgment which sustains the rate must be reversed. There had been an acre rate, which raised one fourth of what was required. When more was found to be wanted, the commissioner opened an account at a bank, and borrowed money, on which interest was chargeable. This was a disregard of the provisions of the legislature, and he cannot now enforce against the proprietors of the lands a rate which he has imposed, not merely to pay the expenses incurred, but the money borrowed, and likewise the interest chargeable upon it. The Court below was of opinion that the money ought to have been raised by an acre rate, but seems also to have considered that the money now sought to be

* 115 * levied could be treated in effect as part of the same tax.

That, however, is but an evasion of the statute, which certainly gives the commissioner no power to raise money by borrowing it of bankers, and thus impose on the owners a charge of interest as well as principal.

Besides, the rate itself is not valid. There is no authority given by this Act to raise money, except for a particular purpose, and in a particular manner. The first purpose is to pay the expenses of obtaining the Act. The present rate is not demanded for that purpose. Nor is it demanded in the manner required; for the Act says that it is to be raised "from time to time," which is clearly an expression employed with the very object of preventing a retrospective rate. Now when the legislature directs that the money shall be raised in a particular way, it is unlawful to raise it in any other way. Parties cannot speculate how far another mode of raising it will amount to a proximate fulfilment of the intentions of the legislature.

The rate is bad, as being retrospective, and being imposed to cover borrowed money. There is a legislative declaration against the principle of borrowing money in cases of this kind. The 7th & 8th Vict. c. 85, § 19, recites that many railroad companies have borrowed money without authority, and instead of treating this as a mere matter of form, the Act provides for existing cases, and forbids the practice in future. The 73d clause of the Holderness

Act relates to orders made by justices and by the commissioner under other clauses, and shows that the mode of proceeding is not here a mere matter of form. The case of *Cortis v. The Kent*

*Waterworks Company*¹ may be referred to * for the opinion * 116 of the Court of Queen's Bench on this point. There, under a jail act, it was held that the commissioners could not make a retrospective rate to reimburse themselves, in one year, money which they had paid in a preceding year. *The King v. Wavell*² shows that a rate cannot be made to repay money borrowed to repair and rebuild a workhouse, and *The King v. Flintshire*³ is a case in which, under circumstances similar to the present, an order of sessions to pay a county treasurer a sum to enable him to reimburse certain persons for an antecedent debt, was held bad. Yet there the treasurer had acted with perfect good faith under the authority of a previous order of the sessions. The case of *Woods v. Reed*,⁴ where it was held that under the Municipal Corporation Act the council of a borough has no power to make a retrospective rate, is also in point, and the Act 7 Wm. IV. and 1 Vict. c. 81 was passed in consequence of that decision, as it was found that in certain instances the existence of such a power was absolutely necessary, and in them it has been expressly given by the legislature. The doctrine to be found in the cases already cited was fully applied in *Farlar v. Chesterton*.⁵

It is clear from all these authorities that, in principle, the mode of proceeding by borrowing money, and then making a rate to pay off the loan and the interest, is one which cannot be sanctioned. The necessary result is to throw the burden of the improvements unequally on different persons. This was felt so * strongly in *The King v. Haworth*,⁶ that a rate, which was * 117 in part prospective, was refused to be enforced, because it was also in part retrospective. The tenants for the first few years will pay nothing, but the whole charge will be thrown on the reversioner. This was a result which the legislature expressly desired to prevent.

The rate here was made without authority. The making of it was entirely beyond the jurisdiction of the commissioner. It is

¹ 7 Barnewall & Cresswell, 314, 344.

¹ 1 Douglas, 116.

² 5 Barnewall & Alderson, 761; 2 Dowling & Ryland, 843.

³ 2 Meeson & Welsby, 777.

⁴ 12 East, 556.

⁵ 2 Moore P. C. C. 330.

therefore an absolute nullity, for the same rule of law applies to such a matter as was applied by the Court of King's Bench to an order of removal in the case of *The King v. Chilverscoton*.¹

The ruling of the Judge at the trial, that the defendants had no power to raise the money in this manner, was therefore perfectly correct; and the overruling of his opinion by the Court of Exchequer Chamber was erroneous. After the month of October, 1837, the power of the commissioner to make a rate was gone; and this point is of considerable importance, because this is not the case of a mere single Act of Parliament with respect to the drainage of this particular district, but there are many other acts, and many other districts, which must be affected by the decision in this case.

The 53d section, on which the question is raised, is directed to two objects. The first is, to enable the commissioner to put on every man his fair proportion of the expense of the drainage; the second is, to afford to the trustees, who are to be appointed after that time, the scale by which the subsequent taxation shall
 * 118 be levied for the purposes and the benefit of the * country.

After the second valuation in October, 1837, all that the commissioner had to do was to make an assessment, and anything beyond that is an abuse of his power, and cannot be supported by the provisions of the Act of Parliament. Powers such as are conferred by this act must be construed strictly; and the right of an individual to levy money by his own mere will should be shown to be such as are exercised, not merely to the satisfaction of lawyers, but to the least detriment of the persons who are liable to pay. The power to make a retrospective rate was foreseen by the legislature, and is confined by the act to a case of absolute necessity, namely, that of defraying the expense of obtaining the act. In all other instances it must be prospective. There are good reasons why this rule should be strictly adhered to.

The original estimate for the work was 20,000*l*. Four or five years afterwards, the sum found to be required was above 90,000*l*. The legislature never intended to give a commissioner power to obtain money by loan for the purpose of carrying on works so enormously exceeding the original estimate. Where a power to raise money after the expense has been incurred was intended to be given, as in the case of paying the expenses of the Act, it is ex-

¹ 8 Term Rep. 178.

pressly given. All that the 53d section intended was, to make a man liable to pay the excess, as ascertained by the second valuation, over what he had already paid ; and the commissioner is, by that section, authorised only to do that which is necessary to equalize the burdens. Here he has done nothing of the sort ; for there does not appear to have been any payment of excess to require him to restore that, and thus make all pay according to their quota of improvement.

* The 78th section is one of an ordinary kind. It refers *119 to proceedings, lawful of themselves, but irregularly carried out, and protects the party, who commits a mere irregularity of form, from being liable as a trespasser.

Sir F. Kelly and *Mr. Watson*, for the defendants in error : —

The facts of this case show that the commissioner is justified in what he has done. The Act was passed in May, 1832 ; he was not appointed till November of that year, and it was therefore impossible that all he did should be anticipatory. The second valuation, too, was necessarily made, after a large sum of money had become due ; for it was impossible, until after the works had been completed, to ascertain how much the lands had been improved in value by those works. It is said that the commissioner had no power to borrow money, but he was bound to perform the works. He could not tell by anticipation how much those works would cost, nor what would be the amount of improved value received by each portion of land ; he could not therefore make anticipatory assessments, &c. consequently the only course for him to pursue was, to borrow money, to be repaid when the works had been finished and the value of the improvements had been ascertained. For the purposes of this Act it was absolutely necessary that the legislature should vest in the commissioner a large discretion as to the mode of proceeding, and if he possessed the right to exercise this discretion, this House will not inquire whether he exercised it in the best possible manner.

The cases cited are inapplicable. In *Cortis v. The Kent Waterworks Company*,¹ the tax was to be * levied upon the *120 occupiers of land ; here it is a tax upon the owners of lands, and therefore the principle of law which discountenances retrospective rates does not apply, — besides which, this Act allows

¹ 7 Barnewall & Cresswell, 314.

tenants who shall pay the rate to deduct such payment from their rents. The necessity, therefore, is not the same in the two cases. The case of *The King v. Haworth*,¹ did not depend on the words of a particular Act of Parliament, but on the general rule of law. Here it is the reverse. *The King v. Flintshire*,² and *Woods v. Reed*,³ are cases where the tax was to be raised from time to time upon the occupiers of the land. There is however one case to which attention has not been called, but which distinctly establishes that a rate may be made to pay for work actually done, and for law expenses. That is the case of *The King v. The Commissioners of Sewers of the Tower Hamlets*,⁴ where it is said,⁵ "There can be no doubt that the nature of the duty of the commissioners, who may, in many instances, be called on to repair works injured by violent floods or other accidents, requires that they should have power to do so without waiting until an assessment can be made, and the rate raised; and the *Case of the Level of Hull*,⁶ is an express authority that a rate may be made to reimburse charges already incurred." The similarity of the duties of the commissioners in the two cases makes that case peculiarly applicable to the present.

This is, in fact, a question as to the exercise of the discretionary power of the commissioners, and as such, ought not to be
 * 121 entertained: but supposing the House * to inquire whether the discretion of the commissioner has been rightly exercised, it is submitted that the circumstances of the case show it to have been so. As to the objection that these rates were, in part at least, intended to repay borrowed money, the answer is, first, the necessity to borrow, and next, that if the borrowing was improper, that cannot be made an objection to the rate; for there is nothing on the face of the rate itself which shows that the money had been borrowed, or that the rate was raised to repay borrowed money. It is submitted, therefore, that this rate is good, both in substance and form, and that this judgment must be sustained, and the bill of exceptions dismissed.

Mr. Martin replied.

THE LORD CHANCELLOR put the following question to the Judges (*Vide supra*, p. 112):—

¹ 12 East, 556.

² 5 Barnewall & Alderson, 761.

³ 2 Meeson & Welsby, 777.

⁴ 1 Barnewall & Adolphus, 232.

⁵ 1 Barnewall & Adolphus, at p. 238.

⁶ 2 Strange, 1127.

“Whether the plaintiff in error, or the defendants in error, are entitled to judgment?” Time was given them to consider their answer.

1848. July 10.

BARON PARKE. — In answer to your Lordships’ question whether the plaintiff or defendants in error are entitled to judgment on the bill of exceptions in this case, all the Judges who heard the argument at your Lordships’ bar are of opinion that it ought to be in favour of the defendants in error. The facts stated in the bill of exceptions, which it is necessary to notice, are very few.

By an Act of Parliament for draining and improving certain low grounds and cars in Holderness, and which received the Royal Assent in May, 1832, the defendant William Stickney was appointed commissioner for carrying it into execution, and Godfrey *Park and Cornelius Collett were thereby ap- *122 pointed valuers. By the 49th section of that Act the commissioner was directed, as soon as conveniently might be, to determine what lands and grounds ought to be deemed low lands and to contribute to the charges of the drainage, and to cause a full and complete map or plan of all the same lowlands and grounds to be made, expressing the names of the several owners, and describing the quantities in acres, roods, and perches, of all the same low lands, which map was to be lodged with the clerk of the commissioner, and a duplicate with the clerk of the peace for the East Riding of Yorkshire. Against such decision of the commissioner any landowner might appeal within a certain time. By the 50th section, the commissioner was empowered, after the expiration of the time allowed for appeals, to proceed to assess, tax, and charge all and singular the said low lands and grounds, and the owners and occupiers thereof, “with such gross sums of money as he the commissioner should from time to time find necessary and requisite for defraying the charges and expenses incident to and attending the obtaining and passing of that Act, and carrying the same into execution, and to assess, rate, and charge every owner and occupier of the said low lands and grounds by an acre rate, &c.” By the 51st section, the commissioner and valuers were directed, as soon as the surveys and schedules were completed, to make a true and perfect valuation of

all the low lands and grounds in their then state ; and by the 52d section, they were required, as soon as the drainage was perfected, again to view and make a second valuation of all the said lands and grounds to be drained and improved by virtue of that Act in their then state. The 53d section is very important ; by

*123 it the commissioner * and valuers were directed to ascertain the real improvement of the lands belonging to each proprietor, by reference to the two valuations before mentioned, and by some instrument in writing to show how much each owner's land had been improved, and by the same instrument proceed to assess, tax, and charge the lands and grounds of all and every such owners and proprietors, according and in proportion to such improved value, with his, her, or their respective quota or portion of the costs, charges, and expenses of obtaining the Act and carrying the same into execution up to the time of making, executing, and completing such instrument and taxation ; and in case the quota or portion of any such owner or proprietor, so to be assessed and taxed by the said commissioner and valuers as aforesaid, shall exceed the sum with which such owner or proprietor shall have been assessed and taxed by virtue and in pursuance of the powers and authorities hereinbefore given to the said commissioner and valuers, then such proprietor or person so interested as aforesaid shall within twenty-one days after notice in writing under the hand of the said commissioner, of such excess shall be given to him or her, &c., pay the same excess to the clerk, receiver, or collector of the said commissioner ; and in case of default the commissioner was authorised to recover and enforce payment by such ways and means as any other assessments or taxes are therein directed to be recovered. (Section 50 had previously given a power to distrain for the acre rate, and section 54 gave such powers as to any rate.) The 53d section then specified the purposes to which the taxes so levied were to be applied.

The commissioner proceeded duly to appoint and determine what were low lands, and made the map and plan and schedules as directed by the Act. As *124 soon as the time allowed for appeals had elapsed, the commissioner and valuers made a perfect valuation of the lands in their improved state. The commissioner then made an acre rate on the whole of the low lands, which was levied. He afterwards borrowed money of certain bankers at Beverley to pay the expenses of the drainage,

and made no other rate until after the works had been perfected and completed. The commissioner and valuers then made a second perfect valuation of the lands in their improved state, and by comparison of the two valuations, ascertained the real improvement of the lands of each proprietor, and then assessed and taxed the lands of each proprietor in proportion to the benefit that he had received. The plaintiff was on this principle assessed and taxed at 5351*l.* 15*s.* 6*d.*, which exceeded the sum which has been already paid in respect of his lands by the sum of 4149*l.* 2*s.* This latter sum was duly demanded; and, the plaintiff not having paid it, a distress warrant was granted by the commissioner and five trustees appointed under the 56th section of the Act. The plaintiff brought an action of replevin. The defendants avowed the taking by virtue of the powers given by the statute. The learned judge who tried the cause ruled that the commissioner and valuers had no power to make and levy the assessment and tax in question, and that the plaintiff was entitled to recover, to which direction a bill of exceptions was tendered; and a writ of error having been brought, the Court of Exchequer Chamber awarded a *venire de novo*.

We are of opinion that that judgment was right. The material question in the case was, whether the commissioner under this Act of Parliament had a power to make a rate to reimburse expenses, or a retrospective * rate; and the greater part of *125 the argument for the plaintiff in error was devoted to showing, by analogy to the cases of poor rates and other rates under several Acts of Parliament which were referred to, that he could not do so. From these cases a supposed rule of law was attempted to be deduced, that there could be no retrospective rate, or rate for paying bygone expenses.

The power of the commissioner depends upon the construction of this particular Act; there is no rule of law which prohibits a retrospective rate. That depends upon the intention of the legislature, and the question is, whether the Act under which each rate is made, does so expressly or impliedly. We are of opinion that by this Act the largest discretion is vested in the commissioner, who is, no doubt, selected by the parties obtaining the Act from the confidence they repose in him, to make one or more rates, and at such time or times as he may think fit, and for expenses incurred and to be incurred. To have fixed rates for a

small or limited amount, at particular times, might have been very inconvenient, troublesome in collection, and unnecessary from the state of the works then going on; to fix them at longer intervals might also be inconvenient. To avoid such inconveniences, instead of providing that rates should be made at any certain time, for any certain amount, or within certain limits of time or amount, the parties obtaining the private act have agreed to invest, and the legislature has carried that agreement into effect by investing, the commissioner with the absolute discretion to make rates, without any appeal for the abuse of it, or any means of control, except those which are given by the power of electing another commissioner at the end of a certain time,

* 126 or the removal * of the existing commissioner for misconduct. If the parties had intended to fetter this absolute discretion, they have themselves to blame for not taking proper precautions against the abuse of the unlimited power, by suggesting provisions for that purpose, to be introduced into the Act of Parliament. As it is, the whole scheme of the Act shows that the discretion is unlimited, including the power of making one or more rates, and providing money beforehand, or making retrospective rates. The 49th section requires the commissioner to do many things which would occasion the outlay of a large sum of money before he can be in a condition to impose any rate or tax; and then the 50th section gives him power to raise, by an acre rate, such sums of money as he (the commissioner) shall from time to time find necessary and requisite for defraying the charges and expenses incident to obtaining the Act and carrying it into execution. Power is therefore given to raise money for the payment of expenses already incurred, and the time of raising it is left entirely in the discretion of the commissioner; and giving this extensive discretion to the commissioner with regard to the sums to be raised and the time of raising them, is quite consistent with other parts of the Act; for by section seventeen he is authorised to give directions for the making and executing all works that he shall think necessary, and to appoint engineers, surveyors, collectors, and other officers, agents, and servants, at his discretion, and to pay them such reasonable salaries and remunerations as he shall order and appoint. In short, the owners of lands to be improved by the drainage appear to have given the commissioner unlimited authority to execute the objects of the Act in such

manner and at such cost as he thought fit, reserving * to *127 themselves only the power of electing another at the end of three years, or (sections seven and nine) to remove him at any time, if dissatisfied with his conduct. But whether they have this redress or not, is immaterial, if by the Act an absolute discretion is given. By the exercise of that discretion they are bound; and the propriety of its exercise cannot be called in question in this action, whatever reason there may be to doubt it. The Court of Exchequer Chamber recently decided a similar point as to a rate made by commissioners of sewers, who are "to cause reparations and amendments to be made, as the case shall require, after their wisdom and discretion." That Court held that after the commissioners had exercised their discretion, no court of law in which an action was brought for any thing done by them in carrying it into effect, had the power to question or review the exercise of that discretion, — that it must be assumed to be correct in all respects, and that the plaintiff would not be permitted to complain of it in that action. *The Saint Katharine Dock Company v. Higgs*.¹

It seems clear, therefore, that when the works necessary for effecting the intended drainage had been completed, the commissioner might have raised, by an acre rate, the whole sum for which the assessment and taxation now called in question were made (except, perhaps, the expense of the second survey and valuation), and having so raised that money, might, with the assistance of the valuers, have made an assessment and taxation precisely similar to that in dispute, and have thereby compelled those, who had not by the acre rate been compelled to pay a portion of the whole expense of the * survey and valua- *128 tion, in proportion to the benefit that they had received, to pay the difference. In either event, the sum to be paid* by the plaintiff would have been the same; and it is a mere matter of form whether he is compelled to pay it by an acre rate, or by the rate apportioning the sums paid to the benefit received, or part by one, and the remainder by the other. And it seems to us, that when the drainage had been completed, and the benefit received by each proprietor could be ascertained, it would have been a very idle proceeding to make and levy an acre rate pressing unequally on the various proprietors, because not in proportion to the benefit received, and then to raise another rate merely to remedy the injus-

¹ 16 Law Journal N. S. Q. B. 377; 10 Q. B. 641.

tice done by the former. If, therefore, the proceeding of the commissioners, in making and levying the rate under which the goods of the plaintiff in error were distrained, had not been strictly regular, we think it would have been substantially so, and a sufficient answer to this action. But it seems to us, that the course pursued was strictly within the 53d section of the Act, in the case which has happened. Before the drainage works were commenced, a valuation was made of the low lands, in their then state; when the drainage had been completed, another valuation was made of the same lands in their then state; so that the real improvement of the lands of each proprietor was ascertained. The commissioners and valuers, by an instrument in writing under their hands, set forth the names of all the proprietors of the low grounds, and the number of acres belonging to each; and did by the same instrument assess, tax, and charge the lands and grounds of all and every such owners and proprietors, according and in proportion to such improved value, with

* 129 his, her, and their respective *quota or portion of the costs, charges, and expenses, incident to obtaining the Act and carrying it into execution, up to the time of making and completing that instrument and taxation. The quota and portion of the plaintiff in error did not exceed the sum with which he had been assessed and taxed, in pursuance of the power to raise acre rates. Notice of that excess was duly given, and the money not having been paid within the time limited by the Act, it was levied by distress under a warrant granted by the commissioner, as directed by the 50th section, with reference to acre rates; which mode of proceeding is also made applicable to levying the rate made under the 53d section. The latter part of this section specifies the purposes to which the money, when received, is to be applied; but that does not affect the regularity of the proceeding in making and levying the rate. The direction of the statute as to the application of the money, is merely, that to those who have already paid more than their quota the excess shall be refunded, and does not contain any enactment that if the money raised is not expended by such refunding, it may not be applied to the payment of liabilities incurred for the drainage works.

We are therefore of opinion, that the objections made to the rate in question fail; and that it constitutes a good defence to this

action, under the avowry and cognizance on the record ; and consequently that on the bill of exceptions the defendants in error are entitled to judgment, and that a *venire de novo* ought to be awarded.

August 21.

THE LORD CHANCELLOR. — My Lords, this case was argued before the learned Judges, and there has been * a unanimous. * 130 opinion of the Judges delivered by Baron Parke, which enters very fully into the question. The learned Judges came to a conclusion, in which, after having carefully considered the reasons on which that conclusion was founded, I entirely concur. I am of opinion that the judgment ought to be for the defendants in error, and that a *venire de novo* ought to be awarded ; and I therefore move, that the judgment of the Court below should be affirmed, with costs.

LORD BROUGHAM. — My Lords, I considered this case when I sat here for my noble and learned friend, some weeks ago ; and I entirely agree with the unanimous opinion then delivered by the learned Judges. They have come to a right construction of the statute, and we ought to give judgment for the defendants in error.

*Judgment affirmed, and venire de novo awarded, with costs.*¹

¹ This case was, on the 30th of April, 1849, brought under the consideration of the House, on an application to revise the judgment, so far as it allowed costs, as the plaintiff in error contended that the House had no power to grant costs upon an award of *venire de novo*. The case was only argued on one side, and was then ordered to stand over, that a search might be made for precedents.

•131 •LADY THYNNE v. THE EARL OF GLENGALL.

1847. April 26, 27, 29. 1848. August 21.

LADY EDWARD THYNNE (by next friend), . . . *Appellant.*
The EARL OF GLENGALL and the COUNTESS, his } *Respondents.*
Wife, and others, }

AND

The EARL and COUNTESS OF GLENGALL, . . . *Appellants.*
LADY EDWARD THYNNE and others, . . . *Respondents.*

Portion. Debt. Bequest of Residue. Satisfaction.

A father having, upon the marriage of his daughter, agreed to give her a portion of 100,000*l.*, transferred one-third part thereof in stock to the four trustees of the marriage settlement, and gave them his bond for transfer of the remainder in like stock upon his death, the latter stock to be held by them on trust for the daughter's separate use for life, and after her death for the children of the marriage, as the husband and she should jointly appoint. The father afterwards by his will gave to two of the trustees a moiety of the residue of his personal estate, in trust for the daughter's separate use for life, remainder for her children generally as she should by deed or will appoint : —

Held, that the moiety of the residue given by the will was in satisfaction of the sum of stock secured by the bond, notwithstanding the differences of the trusts; and, it being found to be for the benefit of the daughter and her children, if any she should have, to take under the will, she was bound to elect so to take.¹ *Vide post*, at pp. 153, 154.

Marriage. Incomplete Agreement. Part Performance.

A father having agreed to settle a certain sum for the benefit of his daughter and the children of her intended marriage with Lord G., a memorandum of the terms of the settlement was by his direction written by his solicitor, and approved of by him and Lord G., and he gave the solicitor instructions to prepare such settlement, but died before the same was ready for execution, having by his will given the daughter real estates and a moiety of the residue of his personal estate. Lord G. married the daughter, and performed his part of the settlement, in conformity to the written memorandum : —

Held, that the memorandum was not a complete agreement, binding within the Statute of Frauds; and of an incomplete agreement there cannot be part performance.²

¹ See Lord Chichester v. Coventry, Law Rep. 2 H. L. 71.

² See Caton v. Caton, Law Rep. 2 H. L. 127, 135.

THESE appeals were brought against a decree and orders of the Master of the Rolls. (See 1 Keen, 769 — in p. 771 the trusts are not correctly stated.)

* The appellant in the first appeal is one of the two * 132 daughters and only children of the late William Mellish. On her marriage with Lord Edward Thynne, on the 8th of July, 1830, her father, in pursuance of a previous agreement, transferred to the names of the trustees of the marriage settlement 33,333*l.* 6*s.* 8*d.*, 3*l.* per cent. consolidated Bank annuities, and executed a bond to secure to them payment of an annuity of 2000*l.* during his life, and the transfer to them by his heirs, executors, &c. on his death, of 66,666*l.* 13*s.* 4*d.*, like Bank annuities, if his said daughter, or any child of the said marriage, should be then living.

The trusts of these different sums were by the indentures of settlement declared to be : —

As to the 33,333*l.* 6*s.* 8*d.*, that the trustees should pay the interest, dividends, and annual income thereof, to Lord Edward Thynne during his life, and after his decease to the appellant for her life, and after the decease of the survivor of them, should apply the said Bank annuities for the benefit of the child or children of the marriage, as Lord Edward Thynne and the appellant jointly, or the survivor of them alone, should appoint, and, in default of appointment, then that the said trust fund should remain on trust for the child or children of the marriage, as in the settlement mentioned.

And, as to the annuity of 2000*l.* and the sum of 66,666*l.* 13*s.* 4*d.* Bank annuities, that the trustees should compel payment of the former, and on the decease of the obligor, in case the appellant or any child of the marriage should be then living, compel the transfer of the latter sum, and should stand possessed of each, on trust during the joint lives of Lord Edward Thynne and the appellant, to pay the annuity during the life of William Mellish, and, after his decease, the * interest, dividends, and annual * 133 income of the 66,666*l.* 13*s.* 4*d.*, as the appellant should, without anticipation, direct, and in default of such direction, to herself, for her separate use ; and after the decease of Lord Edward Thynne, if he should die in the lifetime of the appellant, then to her and her assigns during her life : And after her decease, that the annuity and the said sum of Bank annuities and

the dividends thereof, whether Lord Edward Thynne should be then living or not, should remain and be on trust for the child or children of the marriage,—who, being a son or sons, should attain the age of twenty-one years, or being a daughter or daughters, should attain that age or marry under it, with consent,—as Lord Edward Thynne and the appellant should, during their joint lives, by deed appoint; and in default of appointment, if there should be but one child of the marriage, who, being a son, should attain the age of twenty-one, or, being a daughter, should attain that age or marry under it with consent, in trust for such child, his or her executors, &c.; and if there should be two or more children who should attain the said age, or being daughters should marry under it with consent, in trust for all such children, in equal shares as tenants in common, to be interests vested in a son or sons at the age of twenty-one, and in a daughter or daughters at that age, or marriage under it with consent, as in the indentures mentioned.

And it was by the settlement declared that, if there should be no child of the marriage, or none who should live to acquire a vested interest in the trust funds, then the 33,333*l.* 6*s.* 8*d.* Bank annuities, after the decease of the survivor of Lord Edward Thynne and the appellant, and the annuity of 2000*l.* and the 66,666*l.* 13*s.* 4*d.* Bank annuities, from and immediately *134 after the decease * of the appellant, and such failure of issue as aforesaid, and whether Lord Edward Thynne should be then living or not, should remain in trust for William Mellish, his executors, administrators and assigns, for his and their absolute use.

William Mellish, by his will, dated November, 1833, gave all his real estate to William Astell and Benjamin Barnard, two of the four trustees of the appellant's marriage settlement, upon trust, as to certain parts thereof in the will described, to pay the rents to the appellant for her separate use, for life, without anticipation; remainder to her first and other sons in tail, in strict settlement; remainder to her daughters as tenants in common in tail, with cross remainders among them in tail; remainder to the testator's other daughter, Margaret Laurretta Mellish (now Countess of Glengall, one of the respondents), for her life, for her separate use, in the same manner as her sister; remainder to her

first and other sons in tail male in strict settlement ; remainder to her daughters as tenants in common in tail, with cross remainders amongst them in tail ; remainder to his own right heirs : And, as to certain other parts of his real estate in the will mentioned, upon the same trusts for the benefit of his daughter Margaret Lauretta Mellish and her children, with remainder over, in case of failure of issue, to the appellant and her children, as he had declared with respect to the property given to her, in the same manner as if such trusts were repeated, *mutatis mutandis*. And the testator gave his leasehold house in Richmond Terrace, Whitehall, to his said trustees, upon the same trusts, for the benefit of the appellant and her children, as he had declared with respect to the real estate given to her, * or as near thereto as the nature of the prop- * 135 erty would admit : And he gave his shares in the East and West India Docks, in the Wey and Avon Canal, and in the Poplar and Greenwich Ferry, to the said trustees, for the benefit of his daughter Margaret Lauretta and her children, in the same manner.

The testator, after some gifts to his wife, including an annuity of 2000*l.* for her life, charged on his funded and other property, gave all the residue of his personal estate to his said two trustees, in trust to sell his ships and cargoes, and such other parts thereof as they might think advisable, and to invest the money arising therefrom in Government or real securities ; and, after providing for the payment of the said annuity to his wife, and paying such legacies as he might thereafter give, to stand possessed thereof on the trusts following : —

As to one moiety of such residue, on trust to pay the interest thereof to the appellant, for her separate use for her life, in the same manner as he had directed with respect to the rents of the real estate given to her, remainder for her children, in such shares as she should by deed or will appoint ; and, in default of such appointment, to such children equally, sons to take vested interests at twenty-one, and daughters at that age or marriage ; and in default of such issue, upon the same trusts for his daughter Margaret Lauretta and her children, with a like power of appointment ; and if both should die without issue, then in trust for the testator's next of kin : And as to the other moiety, upon the same trusts for his daughter Margaret Lauretta and her children, with a like power of appointment, and failing issue, for her sister and her

children, with ultimate remainder to the testator's next of kin, as declared with respect to the first moiety. And the testator * 136 desired * that there might be inserted in his will the usual power with respect to maintenance and advancement of his daughters' children during their minorities: And after other powers to his said trustees, he appointed them and three other persons executors of his will.

The testator died on the 27th of January, 1834. His will was proved by Benjamin Barnard alone.

Before Mr. Mellish's death, a marriage had, with his consent, been agreed on between the Earl of Glengall and Margarèt Lauretta Mellish, his daughter, to whom he agreed to give a portion of 100,000*l.* 3*l.* per cent. reduced Bank annuities, to be secured by his bond, and settled on her and the issue of the intended marriage. The Earl of Glengall had also agreed to charge his estates with a jointure for his intended wife, and with the sum of 20,000*l.* for younger children of the marriage. Drafts of the intended bond and settlements were prepared by Mr. Mellish's direction, and approved of by counsel on his behalf, but he died before they were engrossed. The Earl of Glengall executed indentures of settlement on his part, as approved of by Mr. Mellish, with some slight alterations made necessary by his death; and the marriage was solemnized on the 18th of February, 1834.

The bill in this case was filed in April, 1834, by the Earl and Countess of Glengall against Barnard the executor, Lord Edward Thynne and the appellant, his wife, and others, for carrying the trusts of Mr. Mellish's will into execution. The bill, after stating the matters before mentioned, stated the particulars of the treaty in contemplation of the marriage of the plaintiffs to the effect following:—

* 137 That shortly after the date of the testator's will, * proposals of marriage were made to his daughter Margaret Lauretta by Lord Glengall, and the testator told his solicitor, Mr. Tooke, that in the event of his accepting them, he would settle on his said daughter an income similar to that which he had settled on the appellant, with no other difference than that of securing the whole of that income to the separate use of his daughter, Margaret Lauretta; and he should expect Lord Glengall to settle a jointure of

1200*l.* on her, and a sum of 20,000*l.* on the younger children: That the testator being afterwards satisfied with the result of the inquiries made by his said solicitor as to Lord Glengall's property, was induced to entertain his proposals, and to discuss the terms of a settlement: That several meetings took place between Lord Glengall, the testator, and Mr. Tooke, at all of which the testator expressed his intention to place his two daughters on an equal footing, and that at the last of such meetings, on the 7th of January, 1834, it was finally agreed, that if the marriage should take place, the testator would give his bond to the trustees of the intended settlement for payment of an annuity of 3000*l.* during his life, and for transfer to them of 100,000*l.* 3*l.* per cent. reduced Bank annuities immediately after his death; and that such annuity and the dividends of the said stock, after his death, should be paid to Lady Glengall for her life, for her separate use; and if she should die without children, the capital of the stock should revert to the testator; but if there should be children of the marriage, the capital of the stock should go to the younger children, as their parents should appoint; and in default of appointment, among them equally; and if there should be but one child, then to such child: That Lord Glengall should charge his estates with * the * 138 jointure and provision for younger children before mentioned, the latter to be subject to a like power of appointment among them: That as soon as the terms of the settlement had been so agreed upon, Mr. Tooke, by the testator's desire, drew up a memorandum of the arrangement, in the following words:—

“Mr. Mellish to transfer 100,000*l.* consols into the names of trustees, upon trust to pay the dividends to Miss Mellish for her life, to her separate use; on her death without children, to revert to her father's estate. Should there be children, to go to the younger children, as the parents may jointly appoint; if no such appointment, then to go among such younger children, share and share alike; if only one child, to such only child. Lord Glengall to exercise the power contained in the settlement, by covenanting to charge his estate with a jointure of 1200 per annum in favour of his lady, and 20,000*l.* in favour of the younger children, subject to a like power of appointment among them.”

The bill stated that Mr. Tooke read the memorandum over to the testator and Lord Glengall, and they both approved of it; but it was afterwards arranged that the proposed sum of stock should

be secured by bond instead of being actually transferred to the trustees, and that the provision should be, not for the younger children only, but for all the children of the marriage, in conformity with the settlement made on the marriage of Lady Edward Thynne, which the testator desired to be the basis of the intended settlement: That, subsequently to the preparation of the said minute of the terms of settlement, Lord Glengall voluntarily proposed to make a further jointure for Lady Glengall of 6000*l.*

a-year, in case there should be no issue of the marriage;

* 139 *but it was afterwards agreed between him and the testator that the increased jointure should not exceed 2000*l.* a-year:

That on the 13th of January, the testator declared to Mr. Tooke that he had finally accepted the proposals of marriage, and instructed him to prepare the deeds of settlement upon the terms which had been agreed to, and stated his wish that the marriage should take place on the 30th of the same month: That the drafts of the deeds were accordingly prepared, and sent, on the 18th of January, to a conveyancer, and were by him settled, and the testator was perfectly satisfied with them, but desired them to be laid before his friend Mr. Tidd, for his perusal, and they were accordingly sent to Mr. Tidd on the 24th of January, and he approved of them; and they were about to be engrossed and made ready for execution, but the testator died on the 27th day of the same month.

The bill — after stating the solemnization of the marriage of the plaintiffs, and the execution, previously thereto, of indentures by Lord Glengall, charging his estates with 1200*l.*, 2000*l.*, and 20,000*l.* in pursuance of his agreement with the testator, and also the execution of a deed by Miss Mellish, with Lord Glengall's consent, assigning to Mr. Tooke all the share and interest to which she should become entitled during the joint lives of her and Lord Glengall, in the rents of the real estate and in the personal estate devised and bequeathed by the will of her father, upon trust as in the bill mentioned¹ — insisted that the agreement or understanding on the part of Mr. Mellish, to settle the 100,000*l.*, 3*l.* per cent. Bank annuities upon Lady Glengall and the issue of the marriage,

was a good and valid undertaking on his part, more espe-

* 140 cially as Lord * Glengall had, on the faith thereof, executed his part of the agreement; and that such sum of 100,000*l.* Bank annuities ought, under the circumstances, to be considered

¹ See 1 Keen, p. 779.

a debt due from Mr. Mellish at the time of his death, and ought to be paid out of his personal estate, and settled and secured for the separate use of Lady Glengall, and for the benefit of her and her children, upon the same trusts as were stipulated for and agreed upon between Mr. Mellish and Lord Glengall, as set forth in the before-stated memorandum of settlement, and in the said drafts thereof prepared in Mr. Mellish's lifetime. And the bill further submitted and insisted that, if the Court should be of opinion that the plaintiffs were not entitled to have the said sum of 100,000*l.* Bank annuities so raised as aforesaid, the disposition made by Mr. Mellish's will for the appellant and her children, if any she might have, should be considered to operate as a satisfaction of the bond given by him on her marriage; the provisions made by the will for the appellant and her children being of far greater amount and value than the money secured by the bond.

The bill prayed, among other things, that the trusts of the will might be carried into execution; that the usual accounts might be taken, and that it might be declared that, under the circumstances aforesaid, the sum of 100,000*l.* Bank annuities, so agreed by Mr. Mellish to be secured and settled for the benefit of Lady Glengall and her children, constituted a debt against his estate, and that the same ought to be raised out of his personal estate, and settled for the separate use of Lady Glengall, and for the benefit of her and her children, upon the trusts agreed upon between Lord Glengall and Mr. Mellish as aforesaid; but in case the *Court should be of opinion that the plaintiffs *141 were not entitled to have the said sum so raised, then that it might be declared that the aforesaid provision made by Mr. Mellish's will for the appellant and her children was a satisfaction of the said bond.

The appellant, in her answer, submitted that the alleged agreement or undertaking of Mr. Mellish to settle the said sum of 100,000*l.* Bank annuities upon Lady Glengall and her children was not a valid undertaking; that the aforesaid memorandum thereof was intended for his consideration, and not conclusive or binding on his part; that the same could not be enforced against him in his lifetime, and consequently ought not to be considered as a debt due from him at his decease; and the answer also submitted that the provision made by Mr. Mellish's will for the

appellant and her children, if any she might have, ought not to be considered as a satisfaction of the said bond, and the monies thereby secured ; and the appellant claimed to be entitled to both provisions.

There was yet no issue of the marriage of the appellant and Lord Edward Thynne. Lord and Lady Glengall had children, and they were made parties to the cause by supplemental bills.

The causes were heard by the Master of the Rolls, who, by his decree, dated the 7th of November, 1836, after referring it to the Master to take the accounts prayed by the bill, dismissed so much thereof as prayed a declaration that the sum of 100,000*l.* Bank annuities, proposed by Mr. Mellish to be settled for the benefit of Lady Glengall and her children, constituted a debt against his estate ; and his Lordship declared that the appellant and her

issue (if any such she might thereafter have) were not entitled with * Lady Glengall and her issue to an equal share in the residue of the testator's personal estate, in addition to the benefits secured to them by his bond, but that one moiety of the residue bequeathed by the testator, to or in trust for the appellant and her issue, was to be considered as in satisfaction or in lieu of the provision made for them by the bond ; and it was referred to the Master to inquire, and state whether it would be for the benefit of the appellant and her issue (if any she might have) to elect to take under the provisions of the bond, or of the will.

The Master, by his report, made in December, 1841, certified, among other things, that the clear residue of the testator's estate consisted of 4965*l.* due from B. Barnard ; 58,767*l.* 3*l.* per cent. Bank annuities ; 12,000*l.* East India Stock ; 100,000*l.* 3*l.* per cent. reduced annuities ; and 10,000*l.* Bank of England Stock ; and he found that it would be for the benefit of the appellant and her issue (if any such she might have) to elect to take under the provisions of the will, and not of the bond.

The causes came again to be heard by the Master of the Rolls for further directions on the 23d of March, 1842, when his Lordship, by his decretal order of that date, declared, that as it appeared by the report that it was for the benefit of the appellant and her issue (if any she might have) to elect to take under the will, and not under the bond, she ought so to elect ; and that she

and her issue (if any) were entitled to the provisions of the will, and not of the bond.

Several orders were afterwards made by his Lordship consequential on the decree and on this order.

Lady Edward Thynne appealed against so much of the decree of November, 1836, as declared her and her * issue * 143 (if any) not entitled to a moiety of the residue of the testator's personal estate, in addition to the benefits secured to them by his bond ; and as directed the Master to inquire which of the two provisions would be more beneficial to them ; and also against the declaration contained in the decretal order of March, 1842, that she should elect to take under the provisions of the will, as being found to be more beneficial.

The second, or cross appeal, was brought by Lord and Lady Glengall against part of the decree dismissing their bill, so far as it prayed a declaration that the 100,000*l.* Bank annuities, proposed to be settled by Mr Mellish on his daughter and the issue of her then intended marriage with Lord Glengall, constituted a debt against Mr. Mellish's estate ; and against corresponding parts of the consequential orders.

Mr. Stuart and Mr. Hallett for Lady E. Thynne : —

The doctrine and leaning of Courts of Equity against double portions are not applicable to the provisions made for the appellant by her father. In the first place, it has never yet been decided that a testamentary gift of an unascertained residue of personal estate is an ademption or satisfaction of a previously settled portion ; on the contrary, there are numerous cases in which the most eminent judges have expressly decided, or intimated strong opinions, that a gift of residue, an unliquidated and uncertain sum, cannot operate as a satisfaction of a definite sum. In *Freemantle v. Bankes*,¹ Lord Rosslyn held it to be settled by the case of *Watson v. The Earl of Lincoln*,² that a portion, which, *ex vi termini*, is a definite sum, could not be satisfied by a gift of residue of indefinite amount, and he * distinguished the * 144 case before him from that of *Rickman v. Morgan*³ — which, as well as *Smith v. Duffield*,⁴ and *Bengough v. Walker*,⁵ will probably

¹ 5 Ves. 79.

² Ambler, 325, ed. Blunt.

³ 1 Brown C. C. 63 ; and 2 Brown C. C. 394.

⁴ 2 Vernon, 177, 258.

⁵ 15 Ves. 507.

be cited for the respondents, although they are not at all similar to this case. In *Farnham v. Phillips*,¹ a freeman of London having advanced his daughter with a portion, after having given her by his will an equal share of a residue, Lord Hardwicke held her entitled to both, saying that there was no instance of a devise of residue being adeemed by a subsequent portion. That was the converse of this case. In *Devese v. Pontet*,² Sir Lloyd Kenyon, M. R. — after reviewing the cases of *Blandy v. Widmore*,³ *Lee v. D'Aranda*,⁴ and *Barret v. Beckford*,⁵ which have been considered rather cases of actual performance of covenants than of satisfaction — held that a gift of an uncertain residue was never considered as a satisfaction of a certain provision made for a wife on marriage, although the residue may turn out to be more beneficial. In *Smith v. Strong*,⁶ Lord Thurlow held, that portions given by a father to his daughters were not to be in satisfaction, even *pro tanto*, of shares of residue given by his will. The rule to be collected from these cases is that, when a portion of a *certain* amount is secured to a child, it is not satisfied or adeemed by a gift by will of an *uncertain* amount, the uncertainty of residue making all the difference; and that appears to have been Lord Cotten-

* 145 ham's * opinion in the case of *Pym v. Lockyer*,⁷ which is not cited as in any other respect bearing on the present case.

There is an additional feature in the appellant's case. The two thirds of her portion — about the one third, which was transferred to the trustees of the marriage settlement, there is no question — were secured to the trustees by her father's bond, and thereby became a debt against his estate; and a debt, though it may, as a portion also may, be held to be satisfied by a specific legacy, never can be discharged or satisfied by a share of residue, the amount of which depends on so many contingencies. In *Goodfellow v. Burchett*,⁸ one of the earliest cases on this subject, and of unquestionable authority, a father, on the marriage of his daughter, gave his bond for her portion to her husband, and afterwards by his will devised lands of much greater value to the husband and wife and their heirs. The devise was held not to be a satisfaction of the

¹ 2 Atkyns, 215.

² 1 Cox, 188.

³ 2 Vernon, 709; and 1 P. Wms. 323.

⁴ 3 Atkyns, 419; and 1 Ves. Sen. 1.

⁵ 1 Ves. Sen. 519.

⁶ 4 Brown C. C. 493.

⁷ 5 Mylne & Craig, at p. 45.

⁸ 2 Vernon, 298.

bond debt, even though there was a deficiency of assets to pay the testator's other debts. In *Forsight v. Grant*,¹ a wife was entitled by bond, given by her husband on their marriage, to a sum payable on his death for her life, then for the children, and if none, for herself absolutely; the husband, by his will, gave her his real and personal estates for life, to be after her death divided among her children, and, if none, over; there were no children; the wife was declared entitled to both provisions. In *Tolson v. Collins*² — which was not cited at the Rolls — Lord Alvanley held, as to the presumed satisfaction of a debt, even by a legacy, * and *146 not by an uncertain residue as in this case, that circumstances of difference are laid hold of to prevent the application of the rule of satisfaction. That was only stating the doctrine of Courts of Equity, which is, that if a testator makes a gift to his creditor, the slightest difference is sufficient to repel the presumption that the debt is satisfied by the gift.

Another rule of Equity applicable to this case is, that when a testamentary gift is to be a satisfaction of a portion previously provided, or the latter to be an ademption of the former, both provisions must be *ejusdem generis*, attended with the same certainty, and applicable to the same objects, and equally beneficial to them; *Bellasis v. Uthwatt*,³ *Barret v. Beckford*,⁴ *Bengough v. Walker*,⁵ *Adams v. Lavender*.⁶ The two provisions in the present case were essentially different, one being a sum certain, the other uncertain; and they were given to different persons, the portion, or bond debt, being payable to the four trustees of the appellant's marriage settlement, while the moiety of the residue was given to only two of them, in effect, different persons. The limitations and trusts of the two provisions were also different; those of the testamentary gift being for the benefit of appellant and her children generally, and subject to her own appointment; while the trusts of the unpaid portion were declared by the bond and marriage settlement to be for the children of that marriage only, and subject to the joint appointment of the parents.⁷

The case of *Weall v. Rice*,⁸ on which the Master of the Rolls' judgment proceeded, was, if not ill-decided, * at *147

¹ 1 Ves. 298.

² 4 Ves. 483.

³ 1 Atkyns, 426.

⁴ 1 Ves. Sen. at p. 520.

⁵ 15 Ves. 507.

⁶ M'Clelland & Younge, 41.

⁷ Supra, pp. 132 - 135.

⁸ 2 Russell & Mylne, 251.

least different from the present case in many material particulars. His Lordship's attention was confined to the principal question argued before him, which was, whether Lady Glengall should have the 100,000*l.* under the alleged agreement between her father and her husband previous to the marriage. His Lordship, after deciding that she had no right to that sum, and dismissing so much of the bill as applied to that point, proceeded as to the minor part of its prayer to declare that the moiety of the residue, given for the benefit of the appellant and her children, was a satisfaction of the bond; and by the order of March, 1842, the appellant was compelled to elect to take under the provisions of the will. The material difference,—that the gift by the will was to be in trust for the children of the appellant by any husband, and subject to her own appointment, whereas the provisions under the bond were for the children of her marriage with Lord Edward Thynne, and subject to their joint appointment,—was not taken into consideration. From that and other differences between the limitations and trusts of the two provisions, the necessary inference arises that the testator did not intend the gift of residue to be in lieu of that secured by the bond.

Mr. Bethell (with whom was *Mr. Cairns*) was alone heard for the Earl and Countess of Glengall; and *Mr. Teed* (with whom was *Mr. Schomberg*) was alone heard for their children:—

Most of the arguments used, and of the authorities cited for the appellant, were applicable to the one point, that a gift of residue, or of part of residue, of a testator's personal estate, has never been held to be a satisfaction of a debt. But the

*148 question in this *case is whether the two provisions made by *Mr. Mellish* for Lady Edward Thynne are not in the nature of portions? They undoubtedly are; and therefore, upon all the authorities on the subject, one of them must be considered to be—as it was intended by *Mr. Mellish* to be—a satisfaction of the other. That proposition was supported by the cases of *Smith v. Duffield*, and *Duffield v. Smith*,¹ which latter was cited for the appellant, but it is stated in a note to the report to have been reversed in the House of Lords.² The case of *Farnham v. Phillips*³ depended, in some respect, on the custom of London, and

¹ 2 Vernon, 177, 258.

² 2 Atkyns, 215.

³ 15 Lords' Journals, 158.

was in other respects distinguishable from the present case; as was also the case of *Alleyn v. Alleyn*,¹ which was not a case of portions at all, the question being whether a testamentary gift for life only was a satisfaction for an estate in fee to which children were entitled under their mother's marriage articles. The next case, of *Smith v. Strong*,² cited and relied on for the appellant, was wholly inapplicable, being a provision by a father for natural children, to whom he is not considered a parent, or *in loco parentis*, *Ex parte Dubost*.³ The case of *Barret v. Beckford*⁴ was equally inapplicable, the question being whether a gift of residue for the benefit of two persons was a satisfaction, not of a portion, but of an annuity, to one of them, who was not a child, but an aunt. Lord Hardwicke's judgment in that case expresses the leaning of the Court to be against double portions. The case of *Freemantle v. Bankes*,⁵ appears, by the report, * to have been disposed of without consideration, and it is * 149 hardly credible that Lord Rosslyn laid down the doctrine in the language there attributed to him. *Tolson v. Collins*,⁶ one of the last cases cited on the other side, was not a case of parent and child, and is beside the question in the present case; but so far as it is applicable, it supports the argument for the respondents.

Most of those cases were examined by Sir W. Grant in his judgment in *Bengough v. Walker*,⁷ and he says, "They are all cases, in which the testator, without reference to the pecuniary value of the thing he was giving, has given it; and the question was, whether, as upon entering into a computation of the value of the thing given, it turned out equal to the portion or legacy, it should be taken as a satisfaction, the testator not having indicated any idea of his own, as to the value. These cases, therefore, would not precisely apply."

The objection to the substitution of a gift of residue for a portion, is the uncertainty of the residue, which, it is said, "makes all the difference."⁸ But, however contingent and uncertain residue may be, the testator may be, and generally is, aware of the general amount. The residuary gift was made by

¹ 2 Ves. Sen. 37.

² 4 Brown C. C. 493.

³ 18 Ves. at pp. 147, 152.

⁴ 1 Ves. Sen. 519.

⁵ Per Lord Hardwicke in *Bellasis v. Uthwatt*, 1 Atkyns, 426.

⁶ 5 Ves. 79.

⁷ 4 Ves. 483.

⁸ 15 Ves. at p. 512.

Mr. Mellish in such form as makes it quite clear that he knew the amount, and intended it to be in lieu of the portion. It is a rule that when indications are found in the will, of the testator's intention that his bequest is to be in substitution of a portion, the

Court is to presume at once against a double portion.¹

* 150 When the intention is so * indicated, and the two conditions, first, that the provisions by settlement and by will are *ejusdem generis*, secondly, that the residue is not liable to be defeated by any contingency, are found concurring, the presumption of satisfaction of the portion by the gift of residue is complete. In *Rickman v. Morgan*,² Lord Thurlow ridicules the notion that a gift of residue could not, on account of its uncertainty, be a satisfaction of a portion.

The principle, for the application of which the respondents contend, is laid down in the fifth section of the Statute of Distributions,³ which directs the residue of an intestate's estate to be distributed among his children in equal portions, "other than such child or children (not being heir at law), who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime by portion or portions, equal to the share which shall by such distribution be allotted to the other children"; "and in case any child (other than the heir at law) who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portions not equal to the share which will be due to the other children by such distribution as aforesaid, then so much of the surplusage, &c. to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated." Why should not the principle of ademption *pro tanto* there stated, and which was acted upon by Lord Cottenham in *Pym v. Lockyer*,⁴ be

* 151 applied to this case? * The slight differences in the limitations and trusts of the two provisions claimed by the appellant cannot be regarded as of any importance after the decision of the House in the case of the *Earl of Durham v. Wharton*.⁵

LORD BROUGHAM said he did not concur in that decision, being

¹ Per Lord Eldon in *Ex parte Dubost*, 18 Ves. at p. 150.

² 2 Brown C. C. at p. 396.

⁴ 5 Mylne & Craig, 29; see pp. 38, 46, 48, 49.

³ 22 & 23 Car. II. c. 10.

⁵ 3 Clark & Finnelly, 146.

absent at that time; but it was the judgment of the House, and must be followed.

Mr. Bethell. — Lord Cottenham expressed his full concurrence in it, in his judgment in *Powys v. Mansfield*.¹

Mr. Stuart, in reply, insisted that the respondents had not met his proposition comprised in his opening argument, viz. that where a parent has provided a portion of a definite amount for his child on marriage, and afterwards leaves that child the residue, or part of the residue, of his personal estate, which is of uncertain amount, the bequest is not to be considered as a satisfaction of the portion. The uncertainty of the residue prevents the Courts from holding it to be a substitution for the definite portion. Not one testator in a hundred can know, or even guess, the amount of the residue of his *personal* estate: it may be large to-day, and nothing to-morrow. It is different as to real estate. There was no similarity between this case and that of *Earl of Durham v. Wharton*. The judgment of the House there rested on the declaration contained in the marriage settlement, that the sum of 15,000*l.*, settled as portion, was in satisfaction of the sums to which the lady was entitled under her uncle's will.

He again referred to most of the cases before cited on either side; they were — besides these already mentioned — **Clark* *152 v. *Sewell*,² *Haynes v. Mico*,³ *Jeacock v. Falkner*,⁴ *Hanbury v. Hanbury*,⁵ *Powel v. Cleaver*,⁶ *Holmes v. Holmes*,⁷ and *Hall v. Hill*,⁸ against satisfaction of debt, bond, covenant, or portion by legacy, or against ademption of legacy by portion or advancement in a testator's lifetime.

The cases cited in favour of such satisfaction or ademption were *Jesson v. Jesson*,⁹ *Hinchcliffe v. Hinchcliffe*,¹⁰ *Sparkes v. Cator*,¹¹ *Trimmer v. Bayne*,¹² *Garthshore v. Chalie*,¹³ *Leake v. Leake*,¹⁴ *Onslow v. Michell*,¹⁵ *Goldsmid v. Goldsmid*,¹⁶ and *Carver v. Bowles*.¹⁷

¹ 3 Mylne & Craig, at p. 374.

² 3 Atkyns, 96.

³ 1 Brown C. C. 129.

⁴ 1 Brown C. C. 295.

⁵ 2 Brown C. C. 352.

⁶ 2 Brown C. C. 500.

⁷ 1 Cox, 39.

⁸ 1 Drury & Warren, 94.

⁹ 2 Vernon, 255.

¹⁰ 3 Ves. 516.

¹¹ 3 Ves. 530.

¹² 7 Ves. 508, 514.

¹³ 10 Ves. 1.

¹⁴ 10 Ves. 477.

¹⁵ 18 Ves. 490.

¹⁶ 1 Swanston, 211.

¹⁷ 2 Russell & Mylne, 301.

There was no argument on the cross appeal.¹

1848. August 21.

THE LORD CHANCELLOR. — These appeals have stood over for consideration since 1847. Upon Lord Glengall's appeal I think that there is no doubt as to the decree being right. There clearly was no concluded contract at the time of Mr. Mellish's death ; and if there had been, there was no part performance, his death having taken place before the marriage. That appeal must therefore, in my opinion, be dismissed, the necessity for which would be a grievous hardship, if the House should think it necessary to reverse the decree of the Master of the Rolls upon the appeal of Lady Edward Thynne. But if the decree shall be affirmed * 153 so far as it is questioned * by the latter appeal, the result will be to divide the property equally between the two daughters of Mr. Mellish, which, it is certain, was his object and intention.

No case can more satisfactorily exemplify the wisdom of the rule of Equity, leaning against double portions, than the present ; for if Lady E. Thynne were to succeed in the object of her appeal, and so become entitled to the provision secured to her and her family by her marriage settlement, and also to the one half of the residue of her father's property, she would be entitled, not to one half as he intended, but probably to something like three fourths. Fortunately, the rule of Equity prevents these consequences.

Before I consider the authorities as applicable to the facts of this case, I think it expedient to throw out of consideration all the cases which have been cited, in which questions have arisen as to legacies being or not being held to be in satisfaction of debt ; for,

Distinction between satisfaction of debt, and of portion, by legacy. however similar the two cases may at first sight appear to be, the rules of Equity as applicable to each are absolutely opposed, the one to the other. Equity

Equity leans against satisfaction of debt by legacy, but in favour of a provision by will being in satisfaction of a portion by contract. Equity leans against legacies being taken in satisfaction of debt, but leans in favour of a provision by will being in satisfaction of a portion by contract. great improbability of a parent intending a double portion for one child, to the prejudice generally, as in the

¹ See 2 Keen, p. 780.

present case, of other children. In the case of debt, therefore, small circumstances of difference between the debt and the legacy are held to negative any presumption of satisfaction; whereas in the case of portions, small circumstances are disregarded. So in the case of debt, a smaller legacy is not held to be in satisfaction of part of a * larger debt; but in * 154 the case of portions it may be satisfaction *pro tanto*. It has been decided that in the case of a debt, a gift of the whole or part of the residue cannot be considered as satisfaction, because it is said that, the amount being uncertain, it may prove to be less than the debt.

Small differences between the debt and the legacy negative the presumption of satisfaction, but are disregarded in the case of portions.

So in case of debt, a smaller legacy is not a satisfaction of a larger debt, but may be a satisfaction of a portion, *pro tanto*.

A gift of residue cannot be a satisfaction of a debt, because the amount being uncertain, it may be less than the debt.

In considering whether this rule applies to portions, which is the only question in this case, the reason of the rule as applicable to debts must not be lost sight of; because as a portion may be satisfied *pro tanto* by a smaller legacy, the reason given for the rule as applicable to debts cannot apply as to portions. And, on the contrary, as the residue must be supposed to have been considered by the testator as of some value, it would appear upon principle that it ought to be considered as satisfaction altogether, or *pro tanto* according to the amount. For why should 1000*l.* given as residue, not have the same effect upon a larger portion as 1000*l.* given as a money legacy?

But as a portion may be satisfied by a smaller legacy *pro tanto*, so on principle a residue ought to be considered as satisfaction of a portion altogether, or *pro tanto*, according to the amount.¹

All reasoning seems to be in favour of the satisfaction, but the authorities, if direct to the point, must decide. *Blandy v. Widmore*² was a case of intestacy and performance of a contract; so was *Lee v. Cox and D'Aranda*;³ so was *Goldsmid v. Goldsmid*.⁴

If there are not cases raising and deciding this question in terms, there are several from which the rule of the Court may be deduced. In *Linguen v. Souray*⁵ a provision for a wife, contracted for, of a life interest in 1400*l.* was held to be satisfied by a gift by will of the residue, the interest from which exceeded the interest upon the 1400*l.*

¹ See *Hopwood v. Hopwood*, 7 House of Lords Cases, 728.

² 1 P. Williams, 324.

⁵ 1 Swanston, 211.

³ 3 Atkyns, 419; 1 Ves. Sen. 1.

⁴ Prec. in Chanc. 400.

*155 *In *Barret v. Beckford*,¹ the gift of the residue was held not to be a satisfaction, upon the ground of the claim being a debt; and Lord Hardwicke drew the distinction between that case and double portions, seeming to imply that in the latter case the decision would be otherwise.

In *Rickman v. Morgan*,² there was a proviso as to advancement in the settlement. But Lord Thurlow says: ³ "It would be ridiculous to insist that the residue would not have been satisfaction for the 8000*l.*; it is strange to say that the gift of the whole residue being uncertain, shall not be a satisfaction, when a moiety of that very residue, given as a legacy, will."

In *Weall v. Rice*⁴ Sir John Leach lays down the rule as to portions generally, making no distinction between money legacies and gifts of residue; saying, "If a father makes a provision for a child by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *prima facie* to be presumed that he did not mean a double provision."

It is satisfactory to find the doctrine in these cases so consistent with and so conformable to principle; they leave no doubt as to the general rule, and it only remains to consider how far the facts of this case bring it within that general rule.

The obligation upon the appellant's marriage was by bond, dated March, 1830, to transfer to four trustees (two of whom, those named by Mr. Mellish, are also trustees and executors under the will) after Mr. Mellish's death, 66,666*l.* 13*s.* 4*d.*, 3*l.* per cent.

Consolidated annuities, to be by them held upon the trusts
*156 of the settlement; * and by his will, dated Nov., 1833,

he gave to the same two individuals half the residue of his personal estate for the benefit of Lady Edward Thynne and her children; the difference between the two being that by the settlement the appointment amongst the children was to be joint by the husband and wife, and under the will by the wife alone; and that, under the settlement, the children of the marriage were the only objects of the appointment, and under the will, the children of the daughter generally — differences which, according to the rule applicable to double portions, do not negative the presumption of satisfaction. But the case is one of election, which has been dis-

¹ 1 Ves. Sen. 519.

² 1 Brown C. C. 63.

³ 2 Brown C. C. at p. 396.

⁴ 2 Russell & Mylne, at p. 267.

posed of by the Master's report. It appears to me, therefore, that the Master of the Rolls came to the right conclusion, and that both the appeals ought to be dismissed, with costs.

LORD BROUGHAM. — I have come to the same conclusion as my noble and learned friend. As he has argued chiefly the point upon the original appeal of *Lady Edward Thynne v. Lord Glengall*, and has addressed himself less to the cross appeal of *Lord Glengall v. Lady Edward Thynne*, I shall perhaps be excused for entering a little more at large into that, in which I entirely agree with the Court below, and with my noble and learned friend.

In this case I think that the agreement, stated in the bill and referred to in the rest of the pleadings, namely, respecting 100,000*l.* 3*l.* per cent. reduced annuities, was never completed; that Mr. Mellish's consent to, and concurrence in it, rested wholly in parol; that neither he, nor Mr. Tooke for him, ever signed it; not only that, but that it was not completed, even by parol; that after the draft had been prepared, read to him, and *approved of by him, it was submitted to Mr. Bellenden *157 Ker, and he having settled it, Mr. Mellish was apprised of the state of the draft, and though Mr. Tooke, in his answer to the fourth interrogatory, says he approved, yet it is evident he desired something further to be done; for he made Mr. Tooke submit the draft to his (Mr. Mellish's) old friend, Mr. Tidd, for his perusal. Accordingly Mr. Tidd perused it, and expressed his approval "in one or two interviews," says Mr. Tooke, "which I had with him." So that it was not an immediate unhesitating approval; and although Mr. Tidd returned the draft approved on the 24th of the month to Mr. Tooke, I consider that Mr. Tooke was bound to state, and probably would have stated, generally at least, to his client, what had passed with Mr. Tidd at the two interviews, what difficulties he had found, and how those difficulties were removed. Mr. Tooke does not state that he ever told Mr. Mellish any thing that had passed with Mr. Tidd, in whom Mr. Mellish reposed an especial confidence. Nor did Mr. Mellish ever know (which is a material point) that Mr. Tidd ultimately did approve of the draft; for he was seized with the illness, which in three days carried him off, the very day (the 24th) that Mr. Tooke received back the

draft from Mr. Tidd; so that Mr. Mellish died without knowing that it had been approved.

I have put the case of the non-completion of an agreement or contract. But Mr. Tooke, with every disposition—and very naturally—to support Lord Glengall's claim from his (Mr. Tooke's) knowledge of his client's intentions, does not take upon himself to say (which would have made a material difference in the case) that Mr. Mellish ever said that he was to
 * 158 be * considered as assenting, provided Mr. Tidd should approve of the draft. He says no such thing. This view of the case makes the supposed part performance, upon which all the reliance is placed, wholly immaterial; for part performance, to take the case out of the Statute of Frauds, always supposes a completed agreement. There can be no part performance where there is no completed agreement in existence. It must be obligatory, and what is done must be under the terms of the agreement, and by force of the agreement.

The case therefore appears to me to be free from all doubt. I regard the whole as an incomplete agreement, and I agree with the Master of the Rolls, that the part of the bill which referred to it ought to be dismissed. Therefore the decree appealed from should be affirmed, as my noble and learned friend has moved.

This makes way for the consideration of the appeal, in which Lady Edward Thynne is the appellant. I entirely agree with the Master of the Rolls, and with my noble and learned friend, that the appellant must be put to her election, and that she and the issue of her marriage, if any, do elect to take under the will of Mr. Mellish, the bequests of which operate as a satisfaction of the bond of the 8th of July, 1830, and not as a cumulative gift for further advancement—not as a double portion—and therefore that this part of the decree also should be affirmed. Then we give the costs of the original appeal to the Respondents therein; and the costs of the cross appeal to the Respondent in that appeal.

The decree and orders, so far as they were complained of in the two appeals, were then affirmed with costs respectively.

* STEWART v. GREENOCK MARINE INSURANCE CO. *159

1847. June 15, 17. 1848. September 1.

ANN STEWART and others, *Appellants.*
 The GREENOCK MARINE INSURANCE COMPANY and } *Respondents.*
 the DIRECTORS of that Company, }

Insurance. Freight. Abandonment.

In all cases of insurance on a ship, in which the subject is not actually annihilated, the assured claiming as for a total loss must give up to the underwriters all the remains of the property recovered, together with all benefit or advantage incident to it, or rather, such property vests in the underwriters.

Freight, while the ship is in the course of earning it, is a benefit or advantage incident to the ship, and, therefore, becomes the property of the underwriters, paying for a total loss.

A vessel, in the course of a voyage, struck upon an iceberg on the 27th of July, and was considerably injured, but reached Liverpool, and while in the river there, grounded outside the docks on the 11th of August, was afterwards taken into dock, the cargo discharged, and was then surveyed, and, after the survey, namely, on the 1st of September, the owner abandoned to the underwriters on ship, and claimed as for a total loss:—

Held, that the underwriter on ship was entitled, on settling as for a total loss, to have the benefit, in account, of the freight which had been received by the owner on the discharge of the cargo.¹

Two policies were entered into by the defenders, as underwriters, on the ship *Laurel*, of Greenock, one for 1500*l.*, the other for 500*l.* Besides the 2000*l.* thus insured with the defenders, insurances were effected with other companies to the value of 4500*l.*, or 6500*l.* in all. As the vessel was valued in the policies at 7500*l.*, the pursuers stood in the position of their own insurers for the remaining 1000*l.*

* The vessel was insured at and from Liverpool to New *160 York, and thence to any other port in the United States or to Quebec, thence to a port of discharge in the United Kingdom, and thereafter, “until she hath moored at anchor in good safety at her place of destination, and for such period afterwards as she shall be there occupied in discharging her cargo, not exceeding ten days from the date of reporting at the Custom House.” There was a policy on freight executed in similar terms.

¹ See *Bristow v. Whitmore*, 9 House of Lords Cases, 391.

The outward voyage was performed in safety. At Quebec the vessel took in a cargo, chiefly of timber, and left that port on the 14th of July, bound for Liverpool. On the 27th of July, and before it had quite completed half the passage homeward, it came in violent contact with an iceberg, which carried away the bowsprit, stove in the bows, and occasioned other serious damage. The vessel immediately filled, and became water-logged, but the cargo kept it afloat; and the weather being favourable, it was able, by great exertions on the part of the master and crew, to proceed on the voyage. Reaching Point Lynas, a short way from the river Mersey, a pilot was taken in, and the vessel then proceeded up the river to Liverpool, and arrived off the Brunswick pier-head on the 11th of August. It was flood tide at the time; and the desire of the pilot and master was, to have the vessel immediately taken into dock, but from the state it was in, the dock-master refused to allow this to be done without the order of the harbour-master. The master of the ship accordingly went to him. When the condition the vessel was in, however, was explained to him, he would not consent to its being docked, but gave directions to have

* 161 it moored outside the dock gates, that it * might be scuttled when the tide left. These directions were accordingly followed, and the ship, instead of being taken into harbour, was laid alongside the pier-head in the open river. The consequence was, that as the water left, it grounded, and listed or fell outwards, and sustained much additional damage, many of the timbers being broken, and other injuries done. When the tide had sufficiently receded, holes were bored in the ship's bottom, and the water allowed to run out. The openings were closed before the tide returned, and the ship when floated was carried through the dock gates into the Brunswick basin, where it was moored for the remainder of the night. Next day it was moved from the basin into the dock, and then discharged, no part of the cargo having been removed till the ship was ultimately placed in the dock.

After the cargo was discharged, the vessel was put into a graving dock, and there examined by several Liverpool ship carpenters and surveyors. These gentlemen reported that it would cost 3000*l.* to repair the injuries done to the vessel by the collision with the iceberg on the 27th July, and the grounding in the river on the 11th August. On receiving this report, the owners, on the 1st September, 1842, wrote to the defenders, intimating an aban-

donment. This the defenders refused to accept, on the ground that the injuries done to a vessel valued at 7500*l.* in the policies, were not to that extent which could entitle the owners to claim for a total loss. Some further correspondence took place, the owners having, in the mean time, got additional surveys, by which the amount of damage was declared to exceed 4000*l.*

The pursuers, in October, brought an action against the defenders, in which they claimed as for a total loss. * In * 162 their summons, the pursuers rested their claim solely on the injuries done to the vessel by the iceberg, which they maintained, of themselves amounted to a total loss; but afterwards amended the libel, so as to embrace also the injuries the vessel had received in the river. A record was then made up, the pursuers' first allegation being, "the pursuers are entitled, in the circumstances, to recover under the policies libelled, the full sums insured, as for a loss; and no relevant ground has been stated, or exists, in the circumstances, to exclude the claim for these sums." The defenders pleaded that "as the damage sustained by the *Laurel* did not amount, either actually or constructively, to a total, but only to a partial loss, the pursuers are not entitled to abandon and claim for a total loss"; and also, "that even supposing the pursuers entitled to abandon, and to claim a constructive total loss, they could only do so subject to the condition of their accounting, by way of compensation, to the respondents, as abandonees of the ship, for their proportion of the amount of freight earned, after the accident or accidents through which such constructive loss was occasioned; and the respondents would be further entitled to deduction of a rateable contribution for the value of the stores expended for the general safety."

The freight actually earned and paid to the owners, amounted to 1402*l.* 2*s.* 2*d.*

The case went to trial upon the following issue: "Whether the said ship, by and through injury sustained on or about the 27th July, 1842, and on or about the 11th August, 1842, or one or other of these dates, and during the currency of the said policies, became a wreck, and was totally lost? and whether the defenders, under the said policies, are indebted and * resting * 163 owing to the pursuers in the sums of 1500*l.* and 500*l.*, contained respectively in the said policies, or any part thereof, with interest thereon as libelled."

The jurors returned the following verdict: "That in respect of the matters proven before them, they find for the pursuers, in respect that the *Laurel* was properly abandoned and not worth repairing: that the damage arose from coming in contact with an iceberg, and also from grounding at the dock at Liverpool. Also find that the ship was perfectly sea-worthy; reserving for the decision of the Court the point raised by the defenders, of their title to a proportion of the freight. Also find that the vessel was a total loss, independently of the decayed timber and deficient sails."

The question of the abandonees' right to freight thus reserved for the consideration of the Court, afterwards came on to be argued in the Inner House, when a difference of opinion occurred among the Judges.¹

The Lord President and Lord Mackenzie held that abandonment transferred to the insurers all the rights of the assured as to freight: Lord Fullerton and Lord Jeffrey were of an opposite opinion, holding that the underwriters were not entitled to any part of the freight.

Under these circumstances, cases were ordered to be laid before the Lords of the Second Division, and the permanent Lords Ordinary, for their opinions. The Judges thus consulted, likewise differed among themselves.²

The Lord Justice Clerk, Lord Moncreiff, Lord Medwyn, Lord Robertson, and Lord Wood, were of opinion, that by the abandonment, the freight belonged to the underwriters; while Lord *164 Ivory, Lord Cunninghame, *Lord Cockburn, and Lord

Murray, were of opinion that the underwriters were not entitled to take credit for any freight, but were bound to settle as for a total loss, leaving the freight to be recovered by the owners.

The Judges of the First Division, on considering these opinions, on the 13th of January, 1846, pronounced the following interlocutor: "The Lords, having advised the cases with the opinions of the consulted Judges, find, that the defenders, the Greenock Marine Insurance Company, with whom insurance was effected only on the ship, are entitled, in accounting with the pursuers, to have placed to their credit their due proportion of the freight,

¹ Cases in the Court of Session, Vol. VI. p. 359.

² Cases in the Court of Session, Vol. VIII. p. 323.

amounting to 1402*l.* 2*s.* 2*d.*, subject to such deduction as may be found competent to affect their interest in said freight; and remit the cause to the Lord Ordinary, to hear parties on such deductions, and to take such steps as may be requisite for the investigation and determination of the same, and of the defenders' proportion of the freight; as also to dispose of the whole other matters remaining to be determined under the conclusions of the libel; reserving the effect of this judgment in the question between the pursuers and those of the underwriters on the ship, who are also underwriters on the freight; reserving also the expenses of the discussion of the question of freight, to be disposed of along with the expenses already reserved, and all other expenses in the cause."

The appeal was against this decision.

Sir F. Thesiger and *Mr. Watson* (*Mr. Anderson* was with them) for the appellants:—

The judgment of the Court below must be reversed. It introduces a new principle of insurance law, entirely in contrast to those on which the rights of insurers and *assured have *165 hitherto been deemed to be founded. It gives a retrospective effect to an abandonment, so as to enable an insurer to obtain an advantage such as was never before contemplated. Here the freight was in fact earned before notice of abandonment was given, for the voyage was at an end, *Angerstein v. Bell*,¹ though the risk continued, yet it is contended that that notice relates back to the period of the act which occasioned the loss, and that the insurer on ship becomes, by such retroactive effect of the notice, entitled to the freight. Such a doctrine is alike unsupported by principle or authority.

Notice of abandonment is not necessary in all cases, in order to entitle an assured to recover as for a total loss; *Cambridge v. Anderton*; ² *Roux v. Salvador*.³ Where the ship is really lost it is not necessary; it is so only in two cases, that of an embargo and that of a capture, for in these cases the ship exists in specie unharmed, and may still complete the voyage. The abandonment then throws the risk on the abandonee, and notice of the intention to do so must be given to him. But in ordinary cases, when the

¹ Park on Insurance, 54, 8th ed.; Marshall on Insurance, 263.

² 2 Barnewall & Creswell, 691.

³ 3 Bingham N. C. 266.

ship is very much damaged, such a notice is not required. The owner must, indeed, cede all the property insured, or all that remains of it, to the underwriter, and this cession of the thing insured is preliminary to his right to recover. But cession, and notice of abandonment, are two distinct things, and much of the error of the argument on the other side may be traced to confounding them together. When the assured abandons during the continuance of the voyage, and the underwriter accepts the

* 166 abandonment, the effect of the abandonment * is, that the underwriter becomes the carrier of the goods, takes all the risk, and earns the freight. He earns it, in fact, with what has become, by the abandonment, his vessel. This was the principle on which all the cases known as the Russian Embargo Cases were decided. *Thomson v. Rowcroft*¹ was the first of these, though there the question was not expressly decided, for the assured having abandoned to each set of underwriters, indorsed a memorandum on each policy, by which he stipulated that he would assign all his interest in ship or freight to the particular underwriters on the respective policies. He received from each the full amount of insurance, after which, the vessel being relieved from the embargo, completed the voyage and earned freight. The Court there held, that however the question might have been between the different sets of underwriters, litigating out of the same fund, and however the weight of argument in such a case might preponderate in favour of the underwriters on ship, yet, in that individual action which was brought by the underwriters on freight, against the assured upon his memorandum, they were entitled to recover as against him on his own memorandum. *Leatham v. Terry*² was to the same effect; so was *M^r Carthy v. Abel*;³ but this last case settled the rule which had, in *Thomson v. Rowcroft*, been hinted at, namely, that an abandonment pending a voyage, carried to the underwriter on ship the right to recover the freight. All these, however, were cases in which the abandonment took place during the currency of the voyage, in which, therefore, the assured gave up every thing to the under-

* 167 writer on ship, who consequently became his * exact substitute, and who, in virtue of being the actual carrier of the goods, the person whose vessel earned the freight, was the person

¹ 4 East, 34.² 5 East, 388.³ 3 Bosanquet & Fuller, 479.

entitled to receive it. But these decisions do not affect the question here, for here the abandonment did not take place till after the voyage had ended, though during the continuance of the risk. This last case furnishes one observation, which is important to be attended to here, namely, that the date of the accepted abandonment is a material circumstance in settling the rights of the parties. Then came the case of *Case v. Davidson*,¹ with respect to which the same observation may be made as with respect to those already cited, and which, therefore, is not applicable to the present case, for the purpose for which it has already been used, and for which it will again be relied on by the other side. In that case there had been two separate insurances on a general seeking ship, the one on the ship and the other on the freight. The vessel was captured, and the ship and freight were abandoned to the respective underwriters, who each paid a total loss. The vessel was recaptured, and ultimately performed the voyage and earned freight; and, under these circumstances, it was held by the Court, that the underwriters on ship, under the abandonment of the ship to them, were entitled to such freight, for that an abandonment to underwriters on ship, transfers to them the right to the freight earned subsequently to such abandonment, as incident to the ship. The Court then acted avowedly on this principle, that the ship, from the moment of abandonment, becomes the property of the abandonnee, and the property in the ship determines the right to freight, as an incident to the right of property in the ship. In other words, it is *contended that the freight belongs generally * 168 to the owner of the ship, and the owner becomes such by the act of abandonment.

Now this doctrine may be admitted by the plaintiff in error, and yet the consequence sought in this case to be drawn from it will not follow; for here the ship did not become the property of the underwriter, by abandonment to him, until after the freight had been earned. At the time of the abandonment, this vessel had become a wreck, and could not earn freight. The voyage was at an end, though the risk of the vessel still continued. That freight was not therefore earned by the vessel sailing as the underwriter's vessel, and the very principle on which *Case v. Davidson* was decided, consequently raises an argument by way of analogy

¹ 5 Maule & Selwyn, 79; S. C. in error, nom. 5 Moore, 116; 2 Broderip & Bingham, 379; 8 Price, 542.

against the defendant in error here. The case of *Dean v. M'Ghie*,¹ does not carry the argument one step further in favour of the underwriter, but shows that it is the possession of the ship during the time of earning freight, that gives the right to freight. In that case, an owner of a ship mortgaged it by bill of sale while at sea. The agents of the ship took possession of it on its homeward voyage, and before arrival in port, and afterwards received sums on account of freight, and paid seamen's wages and port charges, amounting to a larger sum than the freight received. The mortgagor became bankrupt; and it was held, that the assignees could not sue the mortgagees for money had and received by them for freight, as by the mortgage of the ship, freight accruing due passed to the mortgagee, as incident to the ship, and that he had a right to set off the charges made on account of the ship against the sums received on account of the freight.

* 169 * But then, it is said on the other side, that the plaintiff in error ought not, in the case of a constructive loss, to be in a better situation than if the ship had actually gone to the bottom of the sea. He will not; for if the ship had gone to the bottom while sailing on the open sea, there can be no doubt that he would have recovered on both insurances. On the other hand, the attempt now made to set up this claim for the insurer on ship, tends to place him in a much better situation than if the ship had gone to the bottom of the sea; for, whereas then he would have had to pay for a total loss, without receiving any thing whatever in the way of deduction from that loss, he now has all that remains of the ship which has been abandoned to him. The law never could have intended that he should, in addition, receive all the freight that the vessel had earned, and certainly never could have intended it when that freight had been earned previous to the date of the abandonment.

The freight here was so earned, and the mere fact of an abandonment having been made cannot give the insurer a right which he could not have had without it, for abandonment is not necessary. Now suppose a different state of things. Suppose the vessel in dock, but with the policy still continuing, and a fire to happen, by which the vessel was wholly destroyed, but the goods were saved, the owner would have a right to recover as for a total loss, and yet the insurer on the ship would have no right to freight.

¹ 2 Carrington & Payne, 387; 12 Moore, 185; 4 Bingham, 45.

The case would have been the same if the ship had suddenly gone to pieces outside the docks, but the goods had been saved and delivered to their consignees. Taking the time of the loss here to be the grounding in the docks, there was no subsequent use of the vessel for the purpose of * earning freight, and, * 170 consequently, it was not the vessel of these underwriters which earned the freight.

In the argument in the Court below, some American and French law authorities were relied upon as guides in this matter ; but they will not assist the respondents. For, in the first place, they refer to cases of abandonment pending a risk, and, in the next place, the law of the United States as to freight is different from the law of England in a most material respect, for it admits what we refuse, namely, a calculation of freight on the principle of *pro rata itineris*.¹ On another ground the French authorities are likewise incapable of being appealed to in the argument, for the French law does not hold freight to be an insurable interest.

The only remaining question is, whether an abandonment can have a retrospective effect. It is submitted that it cannot. A notice of abandonment is unnecessary, and an unnecessary proceeding cannot have any effect on the substantive rights of parties, and least of all an effect of a retrospective kind. The use of the ship for the purpose of earning freight is the only ground on which freight can be demanded, and here, the voyage having terminated before the notice of abandonment, and no use of the ship for the purpose of earning it having taken place after that notice was given, the insurer has no title by the mere act of abandonment of ship to claim the freight.

The rights of the parties are therefore the same, so far as freight is concerned, as if the vessel had been absolutely lost by the perils of the sea, but the goods had been saved and delivered to their owners, in which case it is undoubtedly clear that the underwriters on ship would have had no claim whatever to freight.

* *Sir F. Kelly* and *Mr. Wickens* for the respondents : — * 171

The decision of the Court below is correct, and cannot be questioned without overturning some of the great principles of insurance law.

¹ 3 Kent Comm. 319, 4th ed. ; 2 Phillips on Ins. 234.

The first of these principles is, that the policy is a contract of indemnity. It follows from this, that where the assured obtains from the insurer the full value of the ship, the underwriter is entitled to the ship, and all that properly is incident to it. He must be put into the situation (so far as natural events permit) in which the owner stood before the abandonment. This was in effect the decision in the case of *Case v. Davidson*.¹ If the ship had not reached its destined port in safety, but had broken up, the value of whatever remained of it would have belonged to the underwriters. By the payment of full value for it they acquired a complete right to the ship.

The facts as specially stated in this case show that after the 11th of August the ship existed in specie, but in construction of law it was, so far as the owner was concerned, totally lost. It was abandoned by the owner to the insurer, and by that abandonment the underwriter became entitled not only to the ship but to its incidents, of which freight was one. The only question that *Case v. Davidson* can possibly be said to have left undecided is, whether in such a case as this the ship is completely vested in the underwriters at the time of the cause of the loss or of the abandonment. Here the ship, after an injury which caused a constructive total loss, carried a cargo and delivered it; and * 172 the *act of abandonment came between the period when that injury, the cause of the total loss, occurred, and the period when the cargo was actually delivered. The argument in Scotland was, that there was a total loss on the 11th of August, yet the fact was that the ship still existed in specie, conveyed goods, and delivered them, and so freight was earned. After all this occurred, the survey took place, and then the abandonment was made, and yet the argument of the pursuer in the Court below was, that the right to the ship and to what the ship might earn took effect from the time of the abandonment only, and not from the time of the cause of the loss. But that argument cannot be supported. The injury gives the right to abandon, and the abandonment must be referred to that event which alone gives the assured the right to abandon.

It has been contended here that abandonment is not necessary, but it must be remembered that this is not an actual, but only a

¹ 5 Maule & Selwyn, 79; S. C. in error, nom. *Davidson v. Case*, 5 Moore, 116; 8 Price, 542; 2 Broderip & Bingham, 379.

constructive total loss, and that abandonment is only unnecessary in the former case.

[LORD CAMPBELL. — A constructive total loss may be described as a total loss, with a right of salvage.]

And as a consequence of that, it may be argued that when the assured, by a notice of abandonment, converted this constructive into a total loss, every thing in the ship vested in the insurers from the moment at which that constructive total loss occurred. Suppose a ship to be injured on the 1st of January at Van Dieman's Land, and the owner to hear of it in this country and to abandon, but that while the intelligence was coming to him here, the ship was repaired, and sailed, and actually arrived here on the 1st of July, it could not be contended that the title would vest only from the moment of abandonment, it must * vest from * 173 the time of the happening of that matter which the owner had treated as a total loss.

[LORD CAMPBELL. — But the ship and the freight are different subjects, and are capable of distinct insurances, and the question is, whether the total loss of ship is the total loss of freight.

The decision in *Case v. Davidson* shows that whether there is insurance on freight or not, the underwriter on ship is entitled to receive the freight.

[LORD BROUGHAM. — Suppose the freight and the ship insured with the same parties, what would be the consequence ?]

It has been held that where the ship is lost, but not the freight, the underwriter on freight is not liable to pay. But that question does not arise here. This is a simple case of a constructive total loss of ship, in which the underwriters on ship have paid a total loss, and therefore claim that, from the moment of the constructive loss, which, by the owner's abandonment, they have been obliged to treat as an actual total loss, the vessel with all its incidents should be theirs.

The argument on the other side is, that the title of the underwriters to the ship vests, not from the time of the loss, but from the time of the abandonment. It is curious that the law on this point should not have been expressly laid down in any English authority, but is very distinctly stated in an American writer. In *Phillips on Insurance*,¹ it is said: "It is the effect of a valid aban-

¹ 2 *Phillips on Insurance*, 417, 418, Boston ed. 1840.

donment to transfer the property in the subject. The payment of a total loss by the insurers, or their ability to pay such a loss, in consequence of an abandonment, gives them a title to the
 * 174 property, or * what remains of it, as far as it was covered by the policy. An abandonment, considered as an assignment of property, must have reference to the time of the loss, for only that which is constructively lost can be abandoned, and to know what is lost, reference must necessarily be had to the time of the loss. From that time the insurers are, to most purposes at least, entitled to the advantages and subject to the liabilities of ownership. This is not inconsistent with the principle, that the right of abandonment depends upon the state of the existing facts, which means, as we have seen, that the facts of which the assured is informed, and which he makes known to the underwriters as the ground of his abandonment, must constitute a total loss, and also, that the loss must not have ceased to be total in the mean time. The abandonment must be authorised by the existing facts, but, as an assignment, it has reference to the time of the loss. In France an abandonment of the ship, considered as a transfer of the property, has been construed to relate to the time of the risk. Emerigon, 223, c. 17, § 9. But in the English cases, it seems to be taken for granted, that an abandonment of any subject relates to the time of the loss."

In France the effect of the abandonment has a still further retrospective effect, for it goes back to the time of the commencement of the risk itself. But taking the English rules here, it is clear that the abandonment must relate to the time of the loss which occasions it. If that was not so, the underwriter would not be entitled to salvage, nor be liable to repairs and expenses of voyage. He is entitled to the one, he is liable to the other; and therefore he is entitled to the freight, for his right to the
 * 175 vessel and its incidents is * complete from that time. The case of *Young v. Turing*,¹ and several others, show, that so far as the rights of the parties are concerned, a constructive is equivalent to an actual total loss. In these cases the assured could of course recover; but there is no case of that kind where a ship remains in specie, capable of fulfilling the purposes of a ship, in which, if the owner means to treat the voyage as totally lost, he is not bound to give notice of abandonment to the underwriter.

¹ 2 Manning & Granger, 593; 2 Scott N. R. 752.

In *Hodgson v. Blackiston*,¹ it was held that notice of abandonment was necessary, though the ship and cargo had been sold and converted into money when the notice of the loss was received.

There is no distinction between the present case and that of *Case v. Davidson*.² The only question that was not there distinctly and in terms decided was, whether the ship vested in the underwriter from the time of the abandonment or from the date of the occurrence which constituted a total loss. Nothing depends on the acceptance or non-acceptance of the abandonment. If the underwriter refuses to accept the abandonment, that will not in the least degree prevent the assured from recovering. The ground on which the appellants are compelled to insist that there is no necessity for a notice of abandonment is insufficient. The damage done to the vessel in the dock at Liverpool is not noticed in the original summons, but the damage done to it by the iceberg is alone set forth; so that as far as that summons is concerned, the underwriters would be entitled * to freight from that *176 time, because, even on the argument now put forward, the freight would have been earned by the underwriters' vessel. It was so earned in any view of the facts of the case.

Here is a total loss, in respect of which the underwriters have been content to pay the full value of the vessel. That amounts to a sale of the ship, and the buyers of the ship are clearly entitled to all that the thing bought afterwards obtains. If the underwriters had paid the value of the ship on the 11th of August, there can be no doubt that the vessel would have been in every respect theirs from that very night. They could not do that at the moment; for neither owners nor underwriters then knew what had occurred; but they have since paid as for a total loss in respect of the injury which then took place. They are therefore in the same situation as if they had made the payment at that moment. It has been contended that at the time of the abandonment this vessel was a wreck, and could not earn freight; but the answer to that argument is, that the voyage here was not at an end till the delivery of the cargo, and that in fact the vessel, whatever description may be given to it, did, after the period when this total loss occurred, and after the time when the property passed from

¹ 1 Park on Insurance, 400 note, 8th ed.

² 5 Maule & Selwyn, 79; 2 Broderip & Bingham, 379; 5 Moore, 117; 8 Price, 542.

the owner to the underwriter, actually deliver the cargo and earn freight. A hull of a vessel, a mere wreck, may, if it can, bring the goods into port, and, by delivering them, earn freight, the condition of the vessel not having any effect on the question of title to freight. At the time when the total loss happened here, the ship had not earned freight, because the goods had not been delivered, but the freight was earned when they were delivered.

* 177 *The ship here was abandoned, and the effect of an abandonment is thus described in Marshall on Insurance:¹ "By the abandonment, the insured, as we have seen, yields up to the insurers all his right, title, and interest in the ship or goods insured, or what may be saved of them, which, from the notice of abandonment, become the property of the insurers. It operates as a transfer to them in proportion to their respective subscriptions, without any regard to the priority of the policies, if more than one, even though the ship or goods should appear by the several policies to be over-insured. And this transfer has a sort of retrospective relation in reference to the insurers, who to the extent of the sum insured, are presumed to have been, from the beginning, owners of the things insured, according to the rule of the Roman law, '*Quod repudiatur, retro nostrum non fuisse palam est.*' Ff. lib. 38, tit. 5. '*Si quid in fraudem.*'" Nothing can be clearer or more conclusive, and all the rules of law, and all the decided cases justify the statement of the law, which is itself a conclusive answer to the claim of the appellants.

The right to freight could not be abandoned. It did not exist. It was not an inchoate right. The law does not recognise it. The completion of the act of carrying cargo, namely, the delivering of it, alone gives the right to freight. The moment before actual delivery, nothing can be claimed. Then how can it be said here that the shipowner did this act? that he completed the voyage with a ship which was not his property, but had become the property of the underwriters? He who is the owner of the ship during

* 178 the last portion of the voyage is the owner of * the ship during the whole voyage, so far as the right to freight is concerned. He alone can deliver the goods, and obtain payment for the carriage of them.

The only question here on which any doubt can be raised is

¹ Page 612, 3d ed.

therefore, whether the voyage was at an end when this accident happened. It was not. The ship had not arrived at its place of destination. If the cargo had been of a perishable nature, and had been insured, and if the grounding of the ship at the docks had partially injured or wholly destroyed the cargo, there can be no question that the underwriter on cargo would have been liable to make good the damage.

It is therefore submitted that, admitting the doctrine that the freight belongs to the person whose vessel earns it, the vessel here was the vessel of the underwriter when the freight was earned. It had become so by the act of abandonment which, whenever given, related to and had effect from the loss that occasioned it. The underwriter was substituted for and became the owner of the vessel. By him the voyage was completed, and the cargo delivered, and the freight was earned, and consequently this claim of the insurer cannot be supported, and the judgment of the Court below, by which it is negatived, must be affirmed.

Sir F. Thesiger, in reply.

The doctrine that a contract of insurance is a contract of indemnity will be defeated, if the case of *Case v. Davidson* can be applied to the extent to which it is now sought to be applied. For example, if the owner of the ship had insured the ship for 5000*l.*, and * the freight for 6000*l.*, and was compelled by * 179 some accident during the voyage to abandon the ship, the freight would be received by the underwriters on ship, and the owner would not be indemnified. The argument that the voyage continued till the cargo was discharged, is erroneous, and can only be maintained by confounding the duration of the voyage with the duration of the risk. Here the policy on freight is to continue till the ship is moored in good safety at its place of destination, and then for a period not exceeding ten days from the date of reporting at the custom house. This is not an extension of the voyage, but of the risk, and the two things are entirely different from each other. When the vessel drops its anchor at the place of destination, the voyage is at an end. The freight would then be earned though it would not be payable; and another fallacy in the argument on the other side arises from confounding the earning of freight with the payment of it. Suppose they had been obliged to put the goods into lighters to convey them to the shore. If, while

on board the lighters, the goods had been lost, the completion of the voyage would have happened, but not the completion of the risk, and the freight would have been earned by the ship, but would not have been payable by the owner of the goods. This shows the distinction between the two things.

The arguments of the respondent, at the bar of this House and in their printed case, are inconsistent with each other. There they repudiate the necessity of abandonment. Here they insist upon it. *Cambridge v. Anderton*¹ and *Roux v. Salvador*² show that there is no necessity for abandonment in cases where,
 * 180 * as here, the facts show that a total loss has occurred.

As to the effect of notice of abandonment, the cases of *Bainbridge v. Neilson*³ and *Patterson v. Ritchie*,⁴ the former of which was acted on by Lord Eldon in this House, in the case of *Smith v. Robertson*,⁵ show that a notice of abandonment may be rendered utterly valueless by subsequent circumstances. Such a notice cannot therefore have the retroactive effect ascribed to it in this case.

It may be admitted here that the abandonment itself applies to the time of the loss, but the argument would carry it back to the time of the damage. If that argument was true, then if a ship received an injury at sea from an iceberg, and arrived in port, and discharged its cargo, but then sank irrecoverably in the docks, the underwriter would be entitled to recover the freight. Again, if the ship while out on a voyage suffered a serious injury, but delivered its outward cargo, and the captain in ignorance of the extent of the damage set sail for home, and was then lost, the argument on the other side would go to show that the underwriter would be entitled to the outward freight. It is impossible to maintain a doctrine that leads to such absurd consequences. But its absurdity goes still further. According to the cases of *Luke v. Lyde*,⁶ *Lutwidge v. Gray*,⁷ and *Shipton v. Thornton*,⁸ the master is bound, if he can prudently do so, to transship the goods,
 * 181 and to carry them to * their port of consignment. But

¹ 2 Barnewall & Cresswell, 691.

⁴ 4 Maule & Selwyn, 393.

³ 3 Bingham N. C. 266.

⁵ 2 Dow, 474.

⁶ 10 East, 329.

⁷ 2 Burrow, 882; 1 Wm. Blackstone, 190, nom. *Luke v. Lloyd*.

⁸ Molloy, p. 259, 6th ed.; Abbott on Shipping, 316, 4th ed.

⁹ 9 Adolphus & Ellis, 314.

if he did so, the argument on the other side would lead to the conclusion that the freight thus earned would become the freight of the underwriter on ship, and not of the assured. This would be a dangerous conclusion, for it would give the master an interest in allowing a loss of goods to be a total loss, instead of giving him an interest to use every means in his power to prevent its becoming so.

[LORD CAMPBELL. — When did the title of the underwriters begin?]

At the time of the total loss. At the time when the owner, by abandoning, declared the total loss. There was no necessity for abandonment here. But if there was, there was no acceptance of it before the 1st of September, and the acceptance is that by which the parties are bound; *Bainbridge v. Neilson*,¹ *Smith v. Robertson*,² and *Patterson v. Ritchie*.³ The rights of the underwriter only arise from that time. The judgment of the Court below is therefore erroneous, and must be reversed.

THE LORD CHANCELLOR. — My Lords, in considering the question reserved by the jury for the decision of the Court, the facts, as found by the verdict, must be the ground upon which such consideration must proceed, and if these are properly attended to, much of the apparent difficulty of the case will, I think, disappear.

The verdict finds, first, that there was a total loss of the Laurel; secondly, that the Laurel was properly abandoned, and not worth repairing. The latter indeed, * is a consequence of *182 the first, rather than a distinct finding. The verdict finds for the plaintiff, which involves a finding that the total loss was within the period covered by the policy.

The verdict finds the total loss to have arisen from the ship having come in contact with an iceberg, on the 27th of July, and also from its having grounded outside the docks at Liverpool, on the 11th of August.

In my view of this case, it is not material whether the total loss is to be considered as having been completed on the 27th of July, or on the 12th of August, for the voyage was not completed at either of these two dates. It was indeed argued that the voyage

¹ 10 East, 329.

² 4 Maule & Selwyn, 393.

³ 2 Dow, 474.

had been completed at the latter date, and the freight earned at that time: the freight was, in fact, subsequently earned by the delivery of the goods, but at the last date to which the total loss can be referred, namely, the 12th of August, it had not been earned. If, instead of timber, the cargo had been of a perishable quality, and therefore destroyed by the ship's filling with water on the 12th of August, could it have been contended that the freight had been earned?

The facts of this case, upon this point, are identical with those in *Samuel v. The Royal Exchange Assurance Company*,¹ in which a ship having been lost whilst moored near the Dock Gates at Deptford, waiting to be admitted, the owner was held entitled to recover against the underwriters for a total loss, the place where the vessel was moored not being the place of its ultimate destination. The case is the same as it would have been if the ship had ceased to exist as such on the 27th July, and the cargo had been

*183 brought home * and delivered by other means. This case, therefore, is one of a total loss, happening before the completion of the voyage.

Now, to constitute a total loss, the actual annihilation of the subject of the insurance is not necessary; it is sufficient if the expenses of repairs would exceed the value of the ship when repaired. In all cases in which the subject is not actually annihilated, the assured is entitled to claim, and claiming as upon a total loss, must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it, or rather, such property vests in the underwriters. Now the freight which a ship is in the course of earning, is a benefit or advantage belonging to it, and is as much to be given up to, or to become the property of the underwriters, paying for a total loss of ship, as any other matter of value belonging to or incident to the subject insured.

It cannot be of importance at what part of the voyage the accident happens, and the property in the vessel is changed by what is accounted in law to be a total loss.

In *Benson v. Chapman*,² the ship, soon after leaving the port of

¹ 8 Barnewell & Cresswell, 119.

² 6 Manning & Granger, 792, argued in this House upon a writ of error on July 3d and 4th, 1848, but not decided when the judgment in this case was given. [It is reported post p. 696.]

loading, sustained damage sufficient to entitle the owner to recover as for a total loss, but the captain had repairs done at an expense beyond what a prudent owner would have incurred, and he brought the cargo home, and the freight was earned, but the Court held that the total loss of the ship carried with it the total loss of the freight. Chief Justice Tindal says, "the assured has sustained a total loss of the * freight, if he abandons the * 184 ship to the underwriters on ship, and is justified in so doing, for after such abandonment he has no longer the means of earning the freight, or the possibility of ever receiving it if earned, such freight going to the underwriters on ship." The damage amounting, as between the assured and the underwriters, to a total loss, the abandonment did not alter the relative rights of the parties, and the principle of that decision was, that the plaintiff, the owner, was entitled to recover against the underwriters on freight as for a total loss of the freight, because the total loss of the ship carried with it the total loss of the freight, and though the freight was afterwards earned, it did not belong to the owners, but to the underwriters on the ship. If, then, in that case, the freight, though actually earned by the ship after what amounted to a total loss as between the owner and the underwriters on freight, did not belong to the owner, but to the underwriters on the ship, how, in the present case, can the freight earned by the delivery of the cargo after a total loss of the ship, belong to the assured?

In *Case v. Davidson*,¹ the ship was on its voyage, and in the course of earning freight, when it was captured. It was abandoned, and by the abandonment became a total loss as between the owner and the underwriters, but that abandonment cannot have greater effect than an actual total loss. In this state of things the ship was recaptured, and earned freight, which was held to belong to the underwriters on the ship, although the owner had abandoned it to the underwriters on the freight. Lord Tenterden says, "I have never * heard of an instance in * 185 which the assured, after abandoning the ship to the underwriters, has stepped in and claimed the freight as against the underwriters; on the contrary, the practice has been uncontested, that the abandonee has received the freight."

¹ 5 Maule & Selwyn, 79, affirmed in the Exchequer Chamber, 2 Broderip & Bingham, 379; 5 Moore, 116; 8 Price, 542.

Unless the title of an abandonee, in cases in which abandonment is necessary, is better than the title of an underwriter, upon an actual total loss not requiring abandonment, which cannot be (an optional total loss, made absolute by abandonment, cannot have a greater or a different effect than an actual total loss), these authorities are decisive of the present case, the jury having found an actual total loss.

In putting the case upon this ground, I must not be understood as disregarding other grounds upon which the opinions of the majority of the Judges appear to have been founded, but it is sufficient for the present purpose to rest the judgment upon the most simple principle and most unquestioned authorities; and being satisfied that these grounds are sufficient to support the judgment of the Court of Session, I think it unnecessary to enter into a discussion of points which have occasioned so much difference of opinion in the Court below. I therefore move your Lordships to affirm the interlocutor appealed from, with costs.

I have to state to your Lordships, that my noble and learned friend not now present, Lord Brougham, has communicated to me that, upon considering this case, he has come to the same conclusion that I have, that the interlocutors appealed from should be affirmed.

Interlocutors affirmed, with costs.

1847. February 2, 4, 22, 23. 1848. August 21.

FRANCIS SEWELL COLE,	<i>Appellant.</i>
THOMAS BIRMINGHAM DALY HENRY SEWELL and	} <i>Respondents.</i>
others,	

Deed of Settlement. Limitations. Contingent Remainder. "Survivors and Survivor."

Lands, held in fee simple, were, by settlement made in 1752, conveyed to trustees, to the use of the settlor for life; remainder to the use of his three daughters for their lives, as tenants in common; remainder to the use of trustees to preserve; remainder, as to the share of each daughter, to the use of her

first and other sons successively in tail male ; remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivors or survivor, during their or her respective lives or life, as tenants in common in case of two survivors, with remainder, in like manner as to the original share, to the use of the first and other sons of such surviving daughters or daughter in tail male ; remainder, in case all the daughters should die without issue male, as to the share of each, to the use of their daughters as tenants in common in tail ; and in case one or two of the settlor's daughters should die without issue, the share or shares of such daughter or daughters, to go to the use of the daughters of the survivors or survivor, as tenants in common in tail general ; and in case all three should die without issue, then remainder over, with ultimate remainder to the use of the settlor in fee. He died soon after without disposing of the reversion : —

Held, that the limitation, in case of the failure of issue, generally, of any of the daughters, to the daughters of the survivors or survivor, was a good contingent remainder, and therefore not void for remoteness :

And also, that the words “survivors or survivor” were to be read “others or other,” and, consequently, the limitation over to the daughters of one of the settlor's daughters, who had issue, was not defeated by the death of that daughter in the lifetime of another, who subsequently died without issue, but that limitation took effect as a good cross remainder.

Construction of Deeds. Effect of Recitals.

One only of the settlor's daughters had issue, four daughters and no son ; L. E. S., one of the four, in 1779, while her sisters, mother, and aunts were living, executed a post-nuptial settlement, which recited the said deed of 1752 — and another of 1749, under which she was entitled to a vested estate tail in lands called the B. estate, on the death of her father — and that she was entitled in remainder or reversion, expectant * and to take effect in pos- * 187 session on the determination of certain prior estates, to several parts of lands in the deed of 1752 mentioned. It also recited a post-nuptial settlement of 1776, in which were recited L. E. S.'s title to certain shares in remainder or reversion expectant, &c., and her desire to limit and assure the same, and that it was thereby witnessed that in order to bar the estates in remainder or reversion, expectant and to take effect in possession as aforesaid, then vested in her, but without prejudice to the prior estates, she and her husband covenanted to levy fines of her said undivided shares in remainder, to ensure to these uses, namely, that the trustee should, out of the hereditaments comprised in the deeds of 1749 and 1752, first falling into possession, take an annuity of 300*l.*, and out of those next falling into possession, a similar annuity, both being for L. E. S.'s separate use, and, subject thereto, to the use of her husband for life, remainder to herself in fee. It further recited that no fines were levied under the deed of 1776, and that L. E. S. was desirous of securing payment of certain debts, and, subject thereto, of settling the said remainders and reversions expectant and to take effect as aforesaid, for the benefit of her two children, and had agreed to settle the same, and all her right and interest in the premises, to the uses thereafter mentioned ; and it was, by the deed of 1779, witnessed that,

in order to bar the estate tail in remainder or reversion expectant upon and to take effect as aforesaid, then vested in L. E. S. in the hereditaments comprised in the deeds of 1749 and 1752, without prejudice to the prior estates, the said L. E. S. and her husband covenanted to levy fines of all her undivided shares in remainder or reversion expectant, and to take effect as aforesaid in the said hereditaments, to enure to trustees for 1000 years, to raise the amount of the aforesaid debts; remainder to other trustees for 1500 years, to raise 5000*l.* for L. E. S.; remainder to other trustees for 2000 years to raise an annuity of 100*l.* out of the lands first falling into possession, and a similar annuity out of those next falling into possession for maintenance of her only son; remainder to trustees for 3000 years, to raise 3000*l.* for her only daughter; remainder to the use of the son and his issue, in strict settlement; remainder to the use of the daughter and her daughters in tail:—

Held, that all the estates and interests, contingent as well as vested, in the lands to which L. E. S. was entitled under the limitations of the deed of 1752, passed and were bound by the deed of 1779, and the fines that were levied in pursuance thereof.

The settlor's three daughters died,—one in 1784, *s.p.*, another, the mother of L. E. S., in 1793, the third, in 1799, *s.p.*,—all intestate and without having
 * 188 disposed of the reversion * vested in them by descent. One of L. E. S.'s sisters died in 1788, intestate and without issue. In 1809 one third of the lands comprised in the deed of 1752 was, on partition, allotted to L. E. S., and by a decree for sale made in 1820, in a suit instituted against her by the trustees of the term of 1000 years comprised in the deed of 1779, it was declared that the whole of the one third so allotted was subject to the trusts of the term, and bound by that deed, and the fines levied in pursuance thereof. By a deed executed in 1825, it was witnessed that for barring all estates tail therein mentioned, and settling the lands therein comprised, L. E. S. and her husband and a trustee of the deed of 1779, conveyed all the said one-third part, so allotted in severalty to L. E. S. as aforesaid, and also her undivided third part of the B. estate (which had then by the death of her father come into possession) to a trustee, that recoveries might be suffered of the said lands, and it was covenanted that they should enure, as to such of the said undivided parts as were comprised in the deed of 1779, to the uses therein mentioned, and in confirmation thereof and of the term of 1000 years; and—after reciting that three specified denominations of lands of which L. E. S. was stated to be seised in tail in remainder, at the date of the deed of 1779, were not comprised therein or in the fines levied in pursuance thereof, and reciting the said suit and decree for sale therein made, and that L. E. S. had agreed to make the said denominations subject to the said term—it was further agreed and declared that the said recoveries should enure to confirm the sale of the said three denominations for the said term, and to give validity to the said decree, and, subject to the said term, to such uses as L. E. S. should appoint, and, as to the lands comprised in the deed of 1779, to such further uses as had not been thereby declared concerning the same, as L. E. S. should by deed or will appoint:—

Held, that by this deed, and the recoveries suffered in pursuance thereof, the

whole' of the lands allotted in severalty to L. E. S. on the partition, except the said three denominations, were made subject to the uses of the deed of 1779.¹

THIS was an appeal from a decree of Sir Edward Sugden, Lord Chancellor of Ireland (4 Drury & Warren, 1; see also 5 Irish Law Rep. 190).

Peter Daly, formerly of Quansbury, in the county of Galway, Esq., being in, and previously to, the year *1752, *189 seised in fee simple of several towns and lands called "the Quansbury" or "Daly estate," conveyed the same by lease and release, dated respectively the 4th and 5th of February, 1752, unto Thomas Lord Athenry and James Daly, and their heirs, to the use of him, Peter Daly, for his life, with remainder, — subject to a trust term thereby created and long since satisfied, — to the use of his three daughters, Honoria, wife of Viscount Kingsland, Anastasia, wife of Charles Daly, afterwards of the Earl of Kerry, and Margaretta, wife of the said Thomas Lord Athenry, for their respective lives, as tenants in common, with the usual limitation to trustees to preserve contingent remainders, with remainders, respectively, to the use of the respective first and other sons of the said Honoria, Anastasia, and Margaretta, severally and successively in tail male; and if any one or two of the said daughters of Peter Daly should die without issue male of her or their body or bodies, then, as to such part or parts of the said lands and premises of her or them so dying without issue male, to the use of the survivors or survivor of the said Honoria, Anastasia, and Margaretta, as tenants in common in case of two survivors, during the respective lives or life of such survivors or survivor, with the usual limitations to trustees to preserve contingent remainders, with remainders to the use of the respective first and other sons of such survivors or survivor severally and successively in tail male; and in case the said Honoria, Anastasia, and Margaretta should die without issue male, then, as to their respective shares and proportions of the said lands and premises, to the use of all and every their respective daughters, as tenants in common in tail of the respective shares of their respective mothers: And in case *one or two of the said daughters of Peter Daly *190

¹ See *Baker v. Tucker*, 3 House of Lords Cases, 106. *Egerton v. Brownlow*, 4 House of Lords Cases, 1, 43; *Evers v. Challis*, 7 House of Lords Cases, 531, 536; *Parker v. Tootal*, 11 House of Lords Cases, 143, 153.

should die without issue of her or their body or bodies, then, as to the share or shares of the said lands and premises of such daughter or daughters so dying without issue, to the use of all and every the daughters and daughter of such survivors or survivor, as tenants in common in tail of the respective shares of such survivors, in case of two survivors, and to the use of the daughter and daughters of such survivor, in case there should be but one survivor, as tenants in common in tail"; and in case the said Honoria, Anastasia, and Margaretta should die without issue, then, after divers remainders over, with ultimate remainder to the right heirs of the said Peter Daly.

Peter Daly died soon after the date of the said deed, intestate, and without having, by deed or otherwise, disposed of his said reversion in fee in the Daly estate, leaving his said three daughters his only issue and co-heiresses surviving.

Honoria, Viscountess Kingsland, and Anastasia, Countess of Kerry, never had any issue.

Margaretta, Lady Athenry,—who became Countess of Louth on the advancement of Lord Athenry to that dignity,—had four daughters, Matilda, Mary, Elizabeth, and Louisa, and no other issue.

Lady Matilda Birmingham died in 1788, in her mother's lifetime, unmarried and intestate.

Lady Mary Birmingham married Viscount St. Lawrence, afterwards Earl of Howth, and had issue four daughters and no son.

Lady Elizabeth Birmingham was married three times, first, to Thomas Bailey Heath Sewell, by whom she had one son, Thomas

Birmingham Daly Henry Sewell (the respondent), and one

*191 daughter, *Elizabeth Blake Sewell (mother of the appellant). Lady Elizabeth married secondly Michael Duffield, and thirdly, Joseph Russell, but had no issue by either of them.

Lady Louisa Birmingham was twice married, first to Lord Wallscourt, afterwards to James Daly, but had no issue by either.

By a deed, dated the 23d of February, 1779, and made between the said T. B. H. Sewell and Lady Elizabeth his wife, of the first part, and several sets of trustees, of the other parts—after reciting certain indentures, dated respectively the 29th and 30th of December, 1742, and made on the marriage of Thomas Lord Athenry, afterwards Earl of Louth, with the said Margaretta,

daughter of Peter Daly, by which certain estates, called the "Birmingham Estate," stood, in the events which happened, limited to the said daughters of the said Thomas and Margaretta, Earl and Countess of Louth, as tenants in common in tail; and that by virtue thereof and of the hereinbefore stated indentures of the 4th and 5th of February, 1752, and other assurances in the law, the said Lady Elizabeth Sewell was seised or entitled in remainder or reversion expectant upon and to take effect in possession, after the determination of certain prior uses, estates, and limitations, of or to several parts, shares, and purparties of and in the towns, lands, and hereditaments thereafter particularly mentioned (being the said Birmingham and Daly estates respectively); and also reciting that by an indenture, dated the 15th of June, 1776, and made between the said T. B. H. Sewell and Lady Elizabeth his wife, of the one part, and M. Lewis of the other,— which *recited the said title of Lady Elizabeth, and her *192 desire to settle and assure her said parts or shares in remainder or reversion in the said lands, — it was witnessed that for carrying the said desire into execution, and in order to bar the estate in remainder or reversion expectant and to take effect as aforesaid, then vested in her, of the said shares of the said hereditaments, but without prejudice to the uses or limitations precedent to the said remainders or reversions, the said T. B. H. Sewell and Lady Elizabeth covenanted to levy a fine or fines of her said parts or shares in remainder or reversion, and that such fine or fines should enure to these uses, viz. that so soon as the hereditaments comprised in the said settlements of 1749 and 1752 should fall into possession by the determination of the prior estates therein respectively mentioned, Lewis (the trustee of the inheritance), his heirs and assigns, should yearly, during the joint lives of the said T. B. H. Sewell and Lady Elizabeth, take out of the hereditaments which should first fall into possession a rent charge of 300*l.* per annum, and also out of the other hereditaments which should next fall into possession, the further rent charge of 300*l.* per annum, to be paid to Lady Elizabeth for her separate use, and, subject to said annuities, to the use of T. B. H. Sewell for his life, with remainder to the use of Lady Elizabeth and the heirs of her body; and further reciting that no fine had been levied in pursuance of the said indenture; and then reciting that Lady Elizabeth Sewell, being desirous to secure payment of certain

scheduled debts of T. B. H. Sewell, the greater part of which had been contracted on her own account, and to make some provision for her said son and daughter, and, subject thereto, *193 to settle and *assure the said remainders or reversions expectant and to take effect as aforesaid, of her said parts, shares, and purparties of and in the said estates, for the benefit of her said children, and such other children as she might thereafter have, she therefore, with the consent of her said husband, proposed and agreed to settle and assure the same, and all her right and interest in the premises, to the uses thereafter declared — it was witnessed, that in order to carry such intention into execution, and to bar the estate tail in remainder or reversion expectant upon and to take effect as aforesaid, then vested in her (Lady Elizabeth) in the hereditaments comprised in the said deeds of 1749 and 1752, without prejudice to the uses, limitations, or charges precedent to the said remainder or reversion expectant or to take effect as aforesaid, then vested in her (except the uses of the deed 1776, which were thereby relinquished), and to the intent that the said remainders or reversions expectant upon, and to take effect as aforesaid, of or belonging to the said Lady Elizabeth, in the said lands, but subject and without prejudice as aforesaid, might be limited and assured to the uses, and subject to the agreements thereafter declared, the said Thomas B. H. Sewell and Lady Elizabeth Sewell covenanted to levy fines of all her undivided shares in remainder or reversion expectant and to take effect as aforesaid, and all the rights, estates, and interests of her, Lady Elizabeth, and of the said T. B. H. Sewell, in her right, in the said Birmingham and Daly estates; and it was declared that the said fines and other assurances then had, or thereafter to be had, should, as to the parts, shares, estates, and interests of Lady Elizabeth in remainder or reversion, expectant and to take *194 effect in *possession as aforesaid of and in the said hereditaments and premises thereinbefore particularly mentioned, enure to the use of trustees for a term of 1000 years, upon trust to raise 6547l., to be applied in the payment of the said scheduled debts of T. B. H. Sewell, and, subject thereto, to the use of other trustees for a term of 1500 years, to raise 5000l. for Lady Elizabeth Sewell, for her separate use, and, subject thereto, to the use of other trustees for a term of 2000 years, to raise an annuity of 100l. out of the lands which should first fall

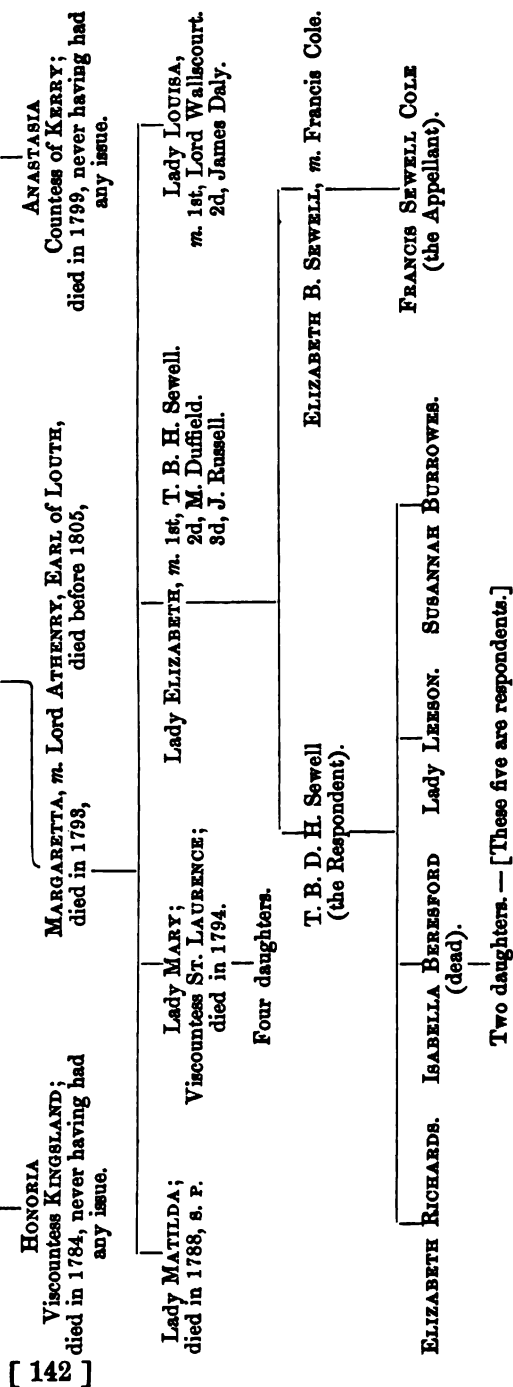
into possession, and a further annuity of 100*l.* out of the lands which should next fall into possession, to be payable during the joint lives of T. B. H. Sewell and Lady Elizabeth, for maintenance of their son T. B. D. H. Sewell during his minority ; and, subject to the said three terms and the trusts thereof, to the use of Edward Nicholas, his heirs and assigns, during the life, and in trust for the separate use of, Lady Elizabeth Sewell, with remainder to the use of other trustees, for a term of 3000 years from her decease, upon trusts to raise 3000*l.*, for the portion of Elizabeth Blake Sewell, and 4000*l.* for any other younger children of Lady Elizabeth Sewell ; and subject thereto to the use of T. B. D. H. Sewell (the said son), for his life, with remainder to a trustee to preserve, &c. ; remainder to the use of the first and other sons of the said T. B. D. H. Sewell severally and successively, in tail, with remainder to the use of all his daughters as tenants in common in tail, with cross remainders between them, and remainders over. And T. B. H. Sewell covenanted that in case Lady Elizabeth Sewell and her said two children, and all other children whom she might thereafter have, should die without issue, before the * said Earl of Louth, or before the death of the *195 survivor of the said Margaretta, Honoria, and Anastasia, so that the term of 1000 years could not vest in possession in the trustees thereof, then he (T. B. H. Sewell) should pay the said scheduled debts.

In the term next after the execution of this indenture, fines were levied in pursuance thereof by T. B. H. Sewell and Lady Elizabeth, his wife, of all the lands comprised in the deeds of 1749 and 1752.

Honoria Viscountess Kingsland died in 1784 ; Margaretta Countess of Louth died in 1793 ; and Anastasia Countess of Kerry died in 1799 ; all intestate, and without having made any disposition of the reversion in fee in the Daly estate, vested in them by descent as before mentioned, which, consequently, upon the death of the survivor of the three, vested in Lady Elizabeth Sewell, and in her then sole surviving sister, Lady Wallscourt, and in the four daughters of Lady St. Lawrence, Countess of Howth, who died in 1794, as co-parceners in fee simple and the then co-heiresses of the said Peter Daly, and also of his three daughters. (See pedigree, p. 142.)

*PETER DALY.

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A suit having been instituted in 1805 for a partition of the Daly estate, a decree was accordingly made therein, and by an indenture dated the 30th of September, 1809, one-third part thereof, decreed and allotted to Lady Elizabeth (then Duffield) in severalty, was conveyed to a trustee, to hold upon the same trusts and purposes, on which her undivided third part of the same estate theretofore stood limited.

A bill was filed in 1812 by T. Lancray and others, representatives of the surviving trustee of the term of *1000 *197 years, created by the deed of 1779, against Lady Elizabeth (then Duffield) and her son (the respondent) and his children and others, for sale of the lands comprised in that term, for payment of the scheduled debts thereby secured. The plaintiffs made claim to the whole of the lands allotted to Lady Elizabeth in severalty, as comprised in the said term. Lady Elizabeth, by her answer, insisted that one fourth only of the one third of the Daly estate was affected by the trusts of the deed of 1779, but the Master, in pursuance of an inquiry directed before him, reported that the said trust term extended over the whole of the one third. That report, unexcepted to, was confirmed, and a decree was pronounced in July, 1820, for the sale of the whole, or a competent part, of the one third of the Daly estate which had been allotted to Lady Elizabeth, and parts thereof were accordingly sold for the residue of the said term, for the purposes of the trusts thereof.

Doubts having arisen whether the town lands of Clooncony, Cloonfagny, and Dereen, which were among the lands sold, were included in the deed of 1779 and in the term of 1000 years, by a deed dated January, 1825, Lady Elizabeth and her then husband Joseph Russell, conveyed the whole of Lady Elizabeth's one-third part of the Daly estate allotted to her in the partition, and also her one undivided third part of the Birmingham estate, to Henry Maxwell Miller, as tenant to the *precipe*, in order that recoveries might be suffered, and it was thereby declared that such recoveries should enure, as to such of the said several divided and undivided parts, shares, purparties, lands, hereditaments and premises as were comprised *in the deed of 1779, to the uses and *198 for the estates therein declared and in confirmation thereof and of the term of 1000 years in particular; and after reciting

that the said three town lands, of which Lady Elizabeth was, at the time of the execution of the indenture of 1779, seised or entitled unto in tail, in remainder, or otherwise, were not comprised therein; and reciting the proceedings in the said suit of *Lancray v. Duffield and others*, and that Lady Elizabeth had agreed to make the said three town lands subject to the said term; it was (by the deed of 1825) further declared that the said recoveries should enure, as to the said town lands, to the use of the trustees of the said term, for the trusts and purposes of raising payment of the said scheduled debts pursuant to the decree in the said suit, and to give effect thereto and to the proceedings thereunder and to any sale that had taken place; and from the determination of the said term, and subject thereto, to such further uses, as to the said town lands, as Lady Elizabeth should by deed or will appoint; and as to all the lands and hereditaments comprised in the deed of 1779, to such further uses as had not been thereby declared concerning the same, as the said Lady Elizabeth should by deed or will appoint.

Two recoveries were, in pursuance of this deed, duly suffered by Lady Elizabeth and Joseph Russell. The monies produced by the lands sold were applied in discharging the said scheduled debts, and the term of 1000 years was determined as to the other lands comprised in the deed of 1779.

A partition was made of the Birmingham estate in 1834, and one-third part thereof, the share of Lady Elizabeth Russell, was conveyed to the uses of the deed of 1779.

* 199 * Lady Elizabeth, having survived her husband, J. Russell, died in 1838, having, by her will, dated August, 1834, devised all her real estates in fee to her grandson, Francis Sewell Cole (the appellant), the only child of Elizabeth Blake Sewell.

In 1840, F. S. Cole filed his bill in Chancery in Ireland, claiming under the said devise three fourths of the whole of Lady Elizabeth Russell's one-third share of the Daly estate, against the respondents, namely, T. B. D. H. Sewell and his three daughters, and the children of a deceased daughter (see pedigree, *supra*, p. 196), and other persons who were interested under the trusts of the terms of 1500 years and 3000 years created by the deed of 1779.

The bill stated, among other things, the deeds of 1752 and 1779,

and that the latter and the fines levied in pursuance thereof did not affect any other interests in the said estates than such as were then vested in Lady Elizabeth Sewell, namely, one fourth of her mother's one-third share ; that in consequence of the deaths of persons, as before mentioned, Lady Elizabeth was, at the time of the execution of the deed of partition, in 1809, entitled to one third of the land comprised in the deed of 1752, and the estate and interest which she had in the entirety of the one third allotted to her by the partition and previous to the sale under the decree in *Lancray v. Duffield and others*, was three-fourth parts thereof in fee simple, the remaining fourth part being subject to the term of 1000 years, and the other trusts of the deed of 1779 ; that the part sold under the said decree was considerably more than one fourth of the share of the Daly estate allotted to Lady Elizabeth, and, consequently, part of her undivided three * fourths of a third share was sold in exoneration of a * 200 competent part of the Birmingham estate from the trusts of the said term, the said three fourths not being at all subject thereto. The bill, after submitting that Lady Elizabeth, at the time and in consequence of the said sale, became entitled to the residue of the one third of the Daly estate allotted to her in the partition, and the same passed to the plaintiff under her will, prayed that the will might be established, and that directions might be given to ascertain what portion (if any) beyond the one fourth of the one third of the Daly estate was sold under the said decree, and that the plaintiff might be declared entitled, as devisee of Lady Elizabeth, to an estate in fee simple, in severalty, in an equivalent portion of certain lands, part of the Daly estate, comprised in the decree for sale, but remaining unsold, and that he might be declared entitled in fee simple to and be put in possession of three-fourth parts of the whole one third of the Daly estate.

The respondents, by their answers, submitted that the whole of the one third of the Daly estate, allotted in severalty to Lady Elizabeth, was comprised in the settlement of 1779, and that she had no disposing power at her death over any of the lands that remained unsold, and they referred to the proceedings and decrees in the partition suit and in the cause of *Lancray v. Duffield and others*, and to the deed of January, 1825, and the recoveries then settled as conclusive against the appellant's case.

Upon the hearing of the cause in June, 1842, an order was made by Lord Chancellor Sugden, for sending a case for the opinion of the Judges of the Court of Common Pleas, upon
 * 201 three questions therein stated. * These learned Judges, after hearing the case argued, certified their opinions: ¹ —

First, that at the time of the execution of the settlement of the 23d of February, 1779, Lady Elizabeth Sewell was entitled, under and by virtue of the limitations of the settlement of the 5th of February, 1752, to a vested remainder in tail in one fourth of her mother Lady Louth's one third of the Daly estate, expectant upon the decease of her mother without issue male, and of her aunts, without issue, and to a contingent remainder in tail in one fourth of each of the respective one thirds of her aunts Lady Kerry and Lady Kingsland of the said Daly estate, expectant upon their decease respectively without issue, and the decease of Lady Louth without issue male.

Secondly, having regard to the settlements of the 30th of December, 1749, and the 5th of February, 1752, they were of opinion that all the estates and interests, to which the said Lady Elizabeth was so entitled under the limitations of the settlement of 1752, passed under and were bound by the settlement of 23d February, 1779, and the fines levied in pursuance thereof.

Thirdly, that the whole of the one third of the Daly estate, which was allotted in severalty to Lady Elizabeth by partition (save only the three omitted town lands) was limited and made subject to the uses of the settlement of the 23d of February, 1779, by the deed of the 1st of January, 1825, and the recoveries suffered in pursuance thereof.

The cause was again heard before the Lord Chancellor, on this certificate and for further directions, in April, 1843, when his Lordship, adopting the opinions of the Judges, decreed that the bill be dismissed.²

* 202 * The appeal was brought against that decree.

Mr. Turner and *Mr. Malins* for the appellant: —

The appellant claims, as general devisee of Lady Elizabeth Sewell, to be entitled in fee simple to three fourths of a third of the Daly estate; another one fourth of one third, in which she took, under the valid limitations of the settlement of 1752, a

¹ See 5 Irish Law Rep. 190.

² 4 Drury & Warren, 1.

vested estate tail in remainder, expectant on the determination of prior estates, passed and was bound by the deed of 1779, and the fines that were then levied. There is no dispute about that part ; but, as to the other parts or shares of Lady Elizabeth in the Daly estate, the appellant has to contend that she took them by descent as one of the co-heiresses of Peter Daly, and of his three daughters, and not by virtue of the limitations of the settlement of 1752.

The first question is, as to the validity of those limitations. It is admitted that they are valid down to the limitation over, "and in case one or two of the said daughters of Peter Daly," &c.,¹ "and in case" all of them died *without issue*, which is void, as tending to a perpetuity ; because the preceding valid limitations to the first and other sons of the daughters and the heirs male of their respective bodies, might be exhausted, without exhausting their issue ; as, for instance, the first and other sons might have daughters, who or whose descendants could not take under the preceding limitation, yet while they or their descendants lived, the limitation over, on general failure of issue, could not take effect, and therefore it was void for remoteness. It is no answer to say that, in the * events which happened, there was no * 203 infringement on the rule against remoteness ; the limitation must be valid in its creation, and not because the event has accidentally happened ;² as Lord Lyndhurst said in the late case of *Lord Dungannon v. Smith*,³ " Unless it is absolutely certain that the event must happen within the period prescribed, it is quite clear that the rule of remoteness applies."

It will be argued here, as it was in the Courts of Chancery and Common Pleas in Ireland, that this limitation over was not a springing or secondary use, as the appellant contends, but a contingent remainder, and therefore there was no violation of the rule against perpetuities, because such remainders may be barred by the tenants of the preceding particular estates. The only authority in support of that argument is the case of *Jack v. Fetherstone*,⁴ which certainly resembles this in some respects ; but which appears, from the report of Chief Justice Bush's judgment, to have been determined on the particular expressions found in

¹ Vide *supra*, pp. 189 and 190.

² *Tollemache v. Coventry*, 2 Clark & Finnelly, 626.

³ 12 Clark & Finnelly, at p. 623.

⁴ 2 Hudson & Brooke, 320.

the instrument. The Court of Common Pleas would not permit that decision to be questioned on the argument in this case, considering themselves bound by it as the decision of a Superior Court (the Exchequer Chamber in Ireland); but no such effect can be attributed to it here; in fact it is under appeal in the present case. Sir Edward Sugden, in his judgment, expressed much surprise to hear the objection of remoteness pressed on him, and observed that before the rule against perpetuities was established,

“while contingent remainders were the only species

* 204 of executory estate known, and *springing and shifting limitations were not invented, the law did speak of remoteness and mere possibilities as an objection to a remainder; but since the establishment of the rule as to perpetuities, no question ever arises with reference to remoteness; for if a limitation is to take effect as a springing, shifting, or secondary use, not depending on an estate tail, and it is so limited that it may go beyond a life or lives in being, and twenty-one years and a few months, equal to gestation, then it is absolutely void.”¹

That is the position for which the appellant contends in this case. But Sir E. Sugden holds this limitation not to be a springing, shifting, or secondary use, but “one of the most regular technical contingent remainders that can be conceived,” and that it falls under Mr. Fearne’s second class of contingent remainders.² The process of reasoning by which he arrives at this conclusion is not very clear or satisfactory. The validity or invalidity of a contingent remainder depends on the event on which it is limited; if the event be too remote, the limitation, though taken as a contingent remainder, is void. Mr. Fearne in another part of his book says,³ “that any limitation in future, or by way of remainder, of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding vested freehold so as to take it out of the description of an executory devise, is by our Courts considered as void in its creation; as in the case of a limitation of lands in succession, first to a person *in esse*, and after his decease to his unborn children, and afterwards the children of such unborn children, this last remainder is absolutely void.”

* 205 * Here are limitations first to the daughters for life, then to their sons in *tail male*—under which no daughter of a son

¹ 4 Drury & Warren, 28.

² Page 502.

³ Page 6, 8th ed.

could take — next, to the daughters of the daughters in tail general, and then, on failure of issue generally of any or all of the daughters, comes this limitation, which might be indefinitely postponed, because it could not take effect while any daughter of a son or any issue of such daughter existed. All the preceding limitations might fail, without general failure of issue. What can remoteness or perpetuity be if that limitation be not one? Such limitation might be got over in wills, but not in deeds. One of the circumstances stated by Fearné, on account of which a limitation intended as a contingent remainder might fail, is “the remote possibility of the contingent event.”¹ “It is requisite that the possibility on which a remainder is to depend should be a common possibility, and *potentia propinqua* at death, or death without issue, or coverture, or the like. Therefore, a remainder to a corporation, which is not in being at the time of the limitation, is void, although it be created during the particular estate. So if there be a lease for life, remainder to the heirs of J. S., though this remainder is good, because by common possibility J. S. may die during the particular estate, yet if there be no such person as J. S. at the time of the limitation, notwithstanding that such a person should afterwards be born, and die during the life of the tenant for life, his heir shall not take by virtue of such limitation, because the possibility on which it is to take effect is too remote; for it amounts to the concurrence of two several contingencies not independent and collateral, but the one requiring the *previous existence of the other, and yet not necessarily * 206 arising out of it.” These passages in Fearné apply strictly to the limitation in this case.

The position laid down by the Lord Chancellor of Ireland, that a contingent remainder can never be affected with the vice of remoteness,² is not sustainable without qualification; that matter has never received direct judicial adjudication; it is not within the rule of remoteness when it is preceded by a vested estate tail, because that may be barred, and thereby the contingent remainder is destroyed; *Gulliver v. Ashby*.³ The rules of law, that no limitation is to be construed to be a shifting or springing use, if it can take effect as a remainder (*Carwardine v. Carwardine*⁴); and that

¹ Cont. Rem. pp. 248, 250.

² 4 Burrow, 1929.

³ 4 Drury & Warren, 28.

⁴ 1 Eden, 27.

a remainder must vest, if at all, during the continuance of the preceding freehold estate, or at the moment of its determination, are not denied; but attempts have been frequently made to limit remainders after several preceding freehold estates, including limitations to persons unborn, so that, as to some of these, the remainders must be too remote; *Hopkins v. Hopkins*; ¹ *Seaward v. Willock*.² Several examples of the sort are given by Mr. Fearne,³ Mr. Preston,⁴ Mr. Jarman,⁵ and other text writers.⁶ The ground on which the Lord Chancellor of Ireland held the limitation in this case to be a good contingent remainder was, that it was supported by an estate tail. But contingent remainders may be created

* 207 without * estates tail to support them. Cases may be put, without end, to show that the correct rule for judging of the validity of limitations is by looking to the terms of them. When a contingent remainder is created by deed, it is necessary that some time be pointed out by the terms of it when it would take effect, in order to prevent a perpetuity. The instrument creating the contingent remainder should point out the event on which the contingency would depend.

The limitation in this case, depending on the general failure of issue of any of the daughters of Peter Daly, transgresses the rule against perpetuity as much as any of the common examples given to illustrate void limitations: As, if you give an estate for life or in tail to A., and if B. die without issue, then over, which is a void limitation; but if to the words "without issue," be added, "in the lifetime of A.," or other words restrictive of issue, so that the gift over may take effect during the continuance of the estate to A., then it is valid. Even in wills, limitations over, after failure of issue, must be read in the restrictive sense, as by prefixing the word "such" to "issue," to denote the issue before mentioned in the will; *Morse v. Lord Ormonde*,⁷ *Ellicombe v. Gompertz*.⁸ But there is no case in which such a construction has been put on a similar limitation in a deed, in which not a word can be added or altered. In *Bristow v. Boothby*,⁹ it was held, that a power created by deed, to take effect after a general

¹ Cas. Temp. Talbot, 44; 1 Atkyns, 580.

² 5 East, 198.

³ Cont. Rem. 251; Ex. Dev. 502.

⁴ 2 On Abstracts, 114, 147.

⁵ On Wills, pp. 226, &c.

⁶ Lewis on Perpetuity, 408.

⁷ 5 Maddock, 99; and 1 Russell, 382.

⁸ 3 Mylne & Craig, 127.

⁹ 2 Simons & Stuart, 465.

failure of issue, the previous limitations not exhausting the whole issue,—just like the present case,—was void for remoteness ; and so was a limitation of rents of real estate, after failure of issue of a * stranger to the preceding limitations, and * 208 behind them ; *Hartopp v. Lord Carbery* ;¹ and so is any estate or charge, limited after an indefinite failure of issue, not inheritable under the preceding limitations in the deed ; *Lady Lanesborough v. Fox*,² *Jones v. Morgan*,³ *Lytton v. Lytton*.⁴

The mistake in the judgment of Lord Chancellor Sugden arose from his attending more to the events that happened than to the terms creating the limitations. An estate is limited, after the life estates of the daughters of Peter Daly, to their first and other sons in tail male, no estate being given to the sons' female issue ; but it must have been assumed at the date of the settlement that there would be female issue of the sons, yet, while such issue, or their descendants, male or female, existed, the event,—the failure of issue of Peter Daly's daughters,—on which the limitation over was to take effect, could not possibly happen.

If, for those reasons, the limitation over be void for remoteness, the appellant's right to one fourth of the Daly estate is perfectly clear, having arisen in this way : The fee simple of the whole estate, subject to the valid limitations, was reserved to the settlor, on whose death it descended to his three daughters, as co-parceners. On the death of Lady Kingsland, in 1784, without issue, the two survivors took her third share, for their lives, as tenants in common, by virtue of the valid limitations, and they then had the descended reversion in fee in the entirety. The Countess of Louth, one of * the survivors, had four daughters, * 209 each of whom was entitled, under the settlement, to a vested estate tail in remainder, expectant on her mother's death, in a fourth part of her original third share ; but not in the moiety of the other one third, which accrued to the mother in 1784, and vested in her in fee, in case the limitation over, and the cross remainders under it, were void. On the death, in 1788, of Lady Louth's eldest daughter without issue, her remainder in one fourth

¹ 1 Sanders on Uses, 197.

² Cases Temp. Talbot, 262 ; and Fearn Ex. Dev. 447, 8th ed.

³ Fearn Ex. Dev. p. 451 ; and Appendix, No. III. ; also 7 Brown P. C. 130.

⁴ 4 Brown C. C. 441.

of the one third, equal to one twelfth of the whole Daly estate, vested in Lady Louth, in fee ; who therefore, besides having a life estate in a moiety, or six twelfths, of the whole estate under the settlement of 1752, had also the fee of three twelfths, which, upon her death in 1793, without disposing of the same, descended to her three surviving daughters, as co-heiresses of her and of Peter Daly, each of them taking one twelfth in fee. In 1799, upon the death of the Countess of Kerry, intestate and without issue, the moiety, or six twelfths, held by her for life, descended to the three co-heiresses, share and share alike, so that Lady Elizabeth Sewell, one of them, then took three twelfths altogether, or one fourth of the Daly estate, in fee simple, which she afterwards devised to the appellant ; the other one twelfth, in which she had a vested remainder in the year 1779, passed by the settlement of that date.

But supposing, without admitting, the limitation, “ in case one or two of the daughters of Peter Daly,” &c. died “ without issue,” to be a good contingent remainder, and also to carry cross remainders in Lady Kingsland’s share of the estate among Lady Louth’s daughters, still the appellant submits that they could not, under that limitation to the issue of “ survivors or survivor,” take
 * 210 remainders in the share of Lady * Kerry, who was herself the last survivor, there being no gift of the share of a surviving daughter, dying without issue, to the issue of a pre-deceased daughter. Cross remainders are not to be raised in a deed by implication ; *Doe v. Dorvell*,¹ *Edwards v. Alliston*.²

But it may be argued here, as it was argued and decided in the Court below,³ on the authority of *Doe v. Wainewright*,⁴ that “ survivors and survivor ” must be read “ others and other.” In that case, which is distinguishable from this, the sequel and context of the will and clear indication of the testator’s intention required that meaning to be put on the words ; they are here manifestly used in their primary and natural sense, the same sense which they naturally bear in the prior limitations to the male issue of the daughters, and which must govern the construction of them in the subsequent limitation. The other is a forced construction, and repugnant to the current of authorities ; *Milson v. Audry*,⁵ *David-*

¹ 5 Term Rep. 518.

⁴ 5 Term Rep. 427.

² 4 Russell, 78.

⁵ 5 Ves. 465.

³ 4 Drury & Warren, 22, 23.

son v. Dallas,¹ Crowder v. Stone,² Cromek v. Lumb,³ Leeming v. Sherratt.⁴ The dictum in *Barlow v. Salter*,⁵ holding "survivors" to be "others," does not affect the authority of those cases.

The whole therefore of Lady Kerry's original third share, and also the one twelfth, which accrued on the death of Lady Matilda Birmingham, in 1788, dropped into the reversion, and all the parts that Lady Elizabeth Sewell took, as co-heiress of her mother and Lady Kerry, were well devised to the appellant.

* The next question, in case the limitation over was not *211 void, is as to the effect of the deed of 1779, and the fines that were then levied. That deed, and the fines, could not affect any contingent estate of Lady Elizabeth Sewell. The recitals in the deed expressly referred to the remainder and reversion then vested in her. Her only vested estate at the time being the one fourth of her mother's share, that was all that was bound by the deed. The fines operated on her vested remainder, but not on her contingent interests in the shares of her aunts. Those interests, although assignable in equity, *Wright v. Wright*;⁶ and devisable, *Roe dem. Perry v. Jones*,⁷ are incapable of alienation in law, *Weale v. Lower*.⁸ Mr. Fearne's statement, "that a contingent remainder may, before it vests, be passed by fine, by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency,"⁹ must be taken in a restricted sense, as in the examples of leases put in Coke's Commentary.¹⁰ The Court of Common Pleas in Ireland,¹¹ and Sir E. Sugden,¹² felt coerced on this point by the case of *Doe v. Oliver*.¹³ That case was very different from the present case, for in that the party levying the fine had no other interest but the contingent remainder. Where an interest actually passes by fine, estoppel does not apply; *Bensley v. Burdon*,¹⁴ *Right v. Bucknell*,¹⁵ *Helps v. Hereford*,¹⁶ *Doe v. Musgrave*.¹⁷ And so where, as here, there was a *vested estate tail for the *212

¹ 14 Ves. 576.

² 3 Russell, 217, 223.

³ 3 Younge & Collyer, 565.

⁴ 2 Hare, 14.

⁵ 17 Ves. at p. 482.

⁶ 1 Ves. Sen. 409.

⁷ 1 H. Blackstone, 30.

⁸ Pollexfen, 54.

⁹ Cont. Rem. 365.

¹⁰ Co. Litt. 45 a, 47 b.

¹¹ 5 Irish Law Rep. 190.

¹² 4 Drury & Warren, 19.

¹³ 10 Barnewall & Cresswell, 181.

¹⁴ 2 Simons & Stuart, at p. 526.

¹⁵ 2 Barnewall & Adolphus, 278.

¹⁶ 2 Barnewall & Alderson, 242.

¹⁷ 1 Manning & Granger, 625.

fine to operate upon, the contingent remainders could not pass nor be affected by estoppel —

[THE LORD CHANCELLOR. — Notwithstanding that the parties intended to bind all their interests ?]

It does not appear that these parties did intend to pass contingent interests. In the recitals in the deed, Lady Elizabeth Sewell's remainder is described, more than once,¹ as "vested in her"; first, in the recital of the relinquished indenture of 1776, it was witnessed that, "in order to bar the estate in remainder or reversion expectant, and to take effect as aforesaid, then vested in her."¹ And in the subsequent recital, that description of her estate is twice used, and it is preserved in the operative part by the words of reference "as aforesaid," which, following "remainder or reversion expectant and to take effect," must be taken to refer to the remainder "then vested in her." The word "vested" was used in contra-distinction to "contingent"; *Russell v. Buchanan*.² The latter word alone would describe Lady Elizabeth's expectant interests in the shares held by her aunts. It is therefore submitted, that one fourth only of one third, that is, one twelfth of the entirety of the Daly estate was made subject to the trusts of the deed of 1779.

The next and last question is, what was the effect of the deed of 1825 upon the whole of Lady Elizabeth Sewell's one-third share, then actually vested in her in severalty, in possession. The appellant submits that it did not extend to, or bring within the uses of, the deed of 1779 any estate or interest or possibility that was not comprised in that deed, except the three denominations * of land, which were omitted from the enumeration of the hereditaments therein mentioned. The express object of the deed was to correct that omission. They were sold under the decree in *Lancray v. Duffield*, and in order to give the purchaser a clear title, Lady Elizabeth and her then husband conveyed, first, her whole third share, not only of the Daly, but also of the Birmingham estate, to a tenant to the *præcipe*, for the purpose of suffering recoveries to enure "as to such only of the undivided parts or shares as were comprised in the deed of 1779, to the uses thereof, and particularly of the trusts of the term of 1000 years." How can it be contended that, so far the deed of 1825

¹ *Supra*, p. 192.

² 7 Simons, 628; 2 Crompton & Meeson, 561.

affected, in the least degree, any other lands or interests of Lady Elizabeth than were previously subject to the trusts of the term ? The deed then recites that three town lands, of which Lady Elizabeth was seised in remainder in tail in 1779, were not comprised in the deed of that date, and that she agreed to make them subject to the trusts of the said term ; and it was declared accordingly that the recoveries should, as to those town lands, also enure to the use of the trustees of the term ; and subject thereto to such further uses, as to these lands and all the lands comprised in the deed of 1779, as Lady Elizabeth should by deed or will declare. It is quite clear, upon the face of the deed, that it was not the intention of the parties to do more than subject the three omitted denominations of lands to the trusts of the term, and it cannot be construed to operate upon any property that was not before subject to the uses of the deed of 1779. Sir E. Sugden himself expressed, in his judgment,¹ considerable doubt whether any of the * deeds * 214 affected Lady Elizabeth's portion of her sister Lady Matilda's one fourth of her mother's third share. It was impossible to comprise that in the deed of 1779, for Matilda was then living, and on her death in 1788, her one fourth fell into the inheritance. Lady Elizabeth Sewell's portion of that part, — which was one-thirty-sixth part of the Daly estate, — remained unaffected by any of the deeds executed by her, and therefore passed by her will to the appellant ; if there were no good cross remainders created by the limitation over “ on the death of any of the settlor's daughters without issue,” in favour of daughters of one, who was not the last survivor, as the appellant contends, then one twelfth more of the estate passed to him by the will ; if the limitation over was void, then one fourth of the estate passed to him. He would have brought his action, and established his title at law, were it not for the outstanding terms, which compelled him to resort to a Court of Equity.

Mr. Tinney and Mr. Shapter for the respondents : —

The claim of the respondents to the whole of Lady Elizabeth Sewell's one third of the Daly estate has been affirmed by the Court of Common Pleas and the Lord Chancellor of Ireland, both holding that the limitation over in the deed of 1752, was a good contingent remainder ; that cross remainders had been created,

¹ 4 Drury & Warren, 36.

not by implication, but by legal construction, and that all the interests Lady Elizabeth had in 1779, contingent as well as vested, were bound by the deed of that date. Supposing that the one-thirty-sixth part, which ultimately devolved on her as her share of her sister Matilda's vested remainder in one fourth of the * 215 one third, in which her mother had a life estate, * was not comprised in the deed of 1779, as Matilda was then living; yet it is submitted, that upon the true construction of the deed of 1825, this part also was made subject to the trusts of the deed of 1779. That was certainly Lord Chancellor Sugden's opinion, although doubtfully expressed in his judgment.¹

The first question raised on the appeal is, whether, after the limitations to the sons and daughters of Peter Daly's daughters, — which did not exhaust their whole issue, — the limitation over, upon the death of any of them without issue, was valid as a contingent remainder. It falls within the second class of contingent remainders as defined by Fearn,² “where some uncertain event, unconnected with and collateral to the preceding estate is, by the nature of the limitation, to precede the remainder.” That definition he illustrates by examples, first, from Coke,³ “as if a lease be made to A. for life, remainder to B. for life, and if B. die before A., remainder to C. for life; here the event of B.'s dying before A. does not in the least affect the determination of the particular estate; nevertheless it must precede and give effect to C.'s remainder; but such event is dubious; it may or may not happen, and the remainder depending on it is therefore contingent.” Then follows another example taken from Leonard,⁴ and equally applicable here.

The contingency, on which the limitation over in this case depends, is the death of the daughters without issue, an event which may or may not happen. That limitation does not * 216 derogate from, or in the least degree * affect, the prior estates limited to the particular class of issue of the daughters; they continue until their natural determination; the remainder over is to take effect on an event collateral to their determination, viz. death without issue; but the nature of the event is

¹ 4 Drury & Warren, 36, 37.

³ Co. Litt. 378 a.

² Cont. Rem. p. 6.

⁴ 4 Leonard, 237.

immaterial. The point was decided in the case of *Jack v. Featherstone*,¹ in the Irish Courts of King's Bench and Exchequer Chamber, where it was held, that a limitation depending on a general failure of issue, was a good contingent remainder, and that case is quite in point here. If a limitation, contingent on a collateral event, may take effect as a remainder, it shall operate as a remainder, and not as a shifting use or executory devise; if it can vest in possession during the continuance of the particular estate, or immediately on its termination, it is a good remainder, if not, it fails; *Carwardine v. Carwardine*,² Gilbert on Uses,³ *Doe v. Morgan*.⁴

If this limitation then be a contingent remainder, there is no ground for the objection of remoteness; because, admitting it to be a positive rule of law that an estate cannot be limited to the child of a person unborn, as a purchaser, — which was not attempted in this case, — the rule against remoteness or perpetuity does not apply to limitations by way of particular estate and remainder at common law, so as to limit the event on which a legal remainder may be made to depend. Death, therefore, without issue of a person whose male issue only is included in prior limitations, is an event on which a remainder may be made to depend. The limitation over in this case, depending on * a general failure of issue of one or more of the daugh- * 217
ters of the settlor, was on the execution of the deed creating it a contingent remainder, which would necessarily become vested within the period prescribed by the rule against perpetuity, or would have been preceded by an estate tail vesting in possession within that period. In the former event, the remainder would have become vested within the lawful period in the owners thereof, who might then immediately alienate it, or it would have become liable, within the same period, to be barred by the tenant in possession of the preceding estate tail. Mr. Butler, in his edition of Fearn, observes (p. 523), "that when Mr. Fearn mentions executory limitations being limited to take effect at too remote a period, he must be understood to have in view such executory limitations as are limited on estates in fee simple or terms for years; for, speaking generally, *no period is too remote for the limi-*

¹ 2 Hudson & Brooke, 320. Judgment affirmed in this House, *Featherston v. Featherston*, 3 Clark & Finnelly, 67.

² Page 173, ed. Sugden.

³ 1 Eden, 27, 34.

⁴ 3 Term Rep. 763.

tation of an executory estate or interest, engrafted on an estate tail previously limited." After giving examples of a void limitation of the former kind, and a good limitation of the latter, he says, "the reason is, that a common recovery by a tenant in fee simple will not discharge his estate from an executory limitation engrafted upon it, but an executory limitation engrafted on an estate tail is discharged by the recovery of the tenant in tail; so that where an executory limitation is engrafted on an estate tail, it is always liable to be defeated by the recovery of the tenant in tail, and therefore the remoteness of the event on which it depends does not suspend the absolute ownership of the property so as to effect a perpetuity." That this was the doctrine of Fearne, is apparent

from various other parts of his book; and in that doctrine * 218 not only Butler, but other text writers, * as Preston,¹ Sanders,² Jarman,³ Lewis,⁴ concur, — all conveyancers, to whose practice the Courts both of law and equity pay great respect, — and to the same effect is the decision in *Nicolls v. Sheffield*,⁵ *Hartopp v. Lord Carbery*,⁶ *Tregonwell v. Sydenham*,⁷ *Bristow v. Boothby*,⁸ and *Morse v. Lord Ormonde*,⁹ all of which turned on the same point, are distinguishable from the present case. *Hopkins v. Hopkins*¹⁰ does not at all apply. The point there in which Lord Hardwicke erred was corrected by Mr. Fearne, pointing out the distinction between estates executory and estates executed. Although there is no direct judicial decision that limitations, taken as remainders at common law, may be destroyed by suffering recoveries, it is now too late to struggle against the unanimous opinions, not only of distinguished text writers, but also of eminent Judges, from Lord Nottingham, in *The Duke of Norfolk's Case*,¹¹ called "the case of perpetuities,"¹² to Sir Edward Sugden in the present case. [The following cases, and others before mentioned were cited on this point: *Burton v. Nichols*,¹³

¹ 2 On Abstracts, 170.

⁷ 3 Dow, 194.

² 1 On Uses, p. 196.

⁸ 2 Simons & Stuart, 465.

³ 1 On Wills, p. 223.

⁹ 1 Russell, 382.

⁴ On Perpetuity.

¹⁰ Cas. Temp. Talbot, 44; 1 Atkyns, 580.

⁵ 2 Brown C. C. 215.

¹¹ 2 Swanston, 254.

⁶ 1 Sanders on Uses, p. 197.

¹² For the origin and history of Perpetuities, Lord Bacon's Law Tracts, 145; Co. Litt. 124; Gilbert on Uses, 301; 2 Harg. Jur. Arg. 27; and Lewis on Perpetuity were cited.

¹³ Littleton R. 315; Cro. Car. 363.

Doe v. Perryn,¹ *Doe v. Morgan*,² *Mogg v. Mogg*,³ *Phillips v. Deakin*.⁴

* The limitation over being valid as a contingent remain- * 219
der, cross remainders were thereby well limited among the daughters of Lady Louth, not only as to her original share, but also in the accruing shares of her sisters. The words are, "in case one or two of the daughters of P. Daly" should die without issue, "then, as to the share or shares of such daughter or daughters so dying without issue, to the use of all and every the daughters and daughter of such survivors or survivor, share and share alike, as tenants in common in tail of the respective shares of such survivors in case of two survivors, and to the daughter and daughters of such survivor, in case there be but one." The only objection to that limitation carrying cross remainders to the daughters of Lady Louth is, that as Lady Kerry was the last survivor, her share could not pass to the daughters of her pre-deceased sister, under the words "survivors and survivor." But it is plain, on the true construction of the deed, and regard being had to the intention of the settlor, and to the manner in which the same words are introduced in a preceding limitation, that these words were not intended to make the contingency of one sister surviving another, a condition essential to the children of that sister taking by way of cross remainders. The words "survivors and survivor" meant simply "others and other"; they have been so construed in all cases in which such construction became necessary to support the intention of the settlor or testator; *Doe v. Wainwright*,⁵ *Davidson v. Dallas*,⁶ *Barlow v. Salter*,⁷ *Cursham v. Newland*.⁸

The next question is, whether the whole of Lady * Elizabeth Sewell's interest in the Daly estate, under the * 220 deed of 1752, was bound by the deed of 1779, and the fines levied in pursuance of it. The difficulty, if any there be, on this point, arises from the confusion in the recitals, and from the use of the word "vested." The deed recites, that by virtue of the deeds of 1749 and 1752, Lady Elizabeth Sewell was "seised or entitled in remainder or reversion, expectant and to take effect in possession, after the determination of certain prior uses," &c. of

¹ 3 Term Rep. 484.

² 3 Term Rep. 763.

³ 1 Merivale, 654.

⁴ 1 Maule & Selwyn, 744.

⁵ 5 Term Rep. 427.

⁶ 14 Ves. 576.

⁷ 17 Ves. 479, 482.

⁸ 2 Beavan, 145.

and in both the estates comprised in those deeds. Then follows a recital of the relinquished deed of 1776, and that she being desirous to secure payment of certain debts, and subject thereto to provide for her son and daughter, "and subject thereto to settle and assure the said remainders or recoveries expectant and to take effect as aforesaid, of her said parts, &c. for the benefit of her said children," she therefore proposed and agreed to settle and assure the said parts, &c. "and all her right and interest in the premises, to the uses" after mentioned. These recitals demonstrate an intention to settle all her estates and interests, contingent as well as vested. The use of the word "vested," in the next recital, cannot be held to restrict the generality of the words before used, "in order to carry such intention into execution, and to bar the estate tail in remainder or reversion *expectant* upon and to take effect as aforesaid, *then vested in her.*" Then comes the operative part, by which she and her husband covenanted to levy fines of all her undivided shares in remainder or reversion, expectant and to take effect as aforesaid, and all the rights, estates, and interests of her, Lady Elizabeth, &c. These comprehensive terms,

corresponding with the recitals, instead of limiting the operation of the deed to the vested remainder in tail, * 221 in the one fourth of her mother's one-third share, extended to all Lady Elizabeth's interests. The term "vested" has not acquired a technical meaning, — it has been construed to mean "payable"; *Sillick v. Booth*.¹ It is sometimes applied in contra-distinction to contingent, but seems to be used here in apposition to "expectant," to which, when omitted, the word "aforesaid" refers. The word is here used to express "over which she had power of disposing." The remainders of Lady Elizabeth having afterwards fallen into her possession, must be held to have been bound by the fines by way of estoppel; *Weale v. Lower*;² *Vick v. Edwards*;³ *Gilman v. Hoare*;⁴ *Doe v. Oliver*;⁵ 4 Bacon Abr.;⁶ Co. Litt.;⁷ *Binsley v. Burdon*,⁸ *Right v. Bucknell*.⁹ The covenant by Mr. Sewell, at the foot of the deed of 1779, shows that he and Lady Elizabeth were dealing with interests not then vested in her.¹⁰

¹ 1 Younge & Collyer C. C. at p. 124.

² Pollexfen, 54.

³ 3 P. Wms. 372.

⁴ 1 Salkeld, 275.

⁵ 10 Barnewall & Cresswell, 181.

⁶ Tit. Leases, O.

⁷ Pages 45 a, 47 b, 252 b.

⁸ 2 Simons & Stuart, 519.

⁹ 2 Barnewall & Adolphus, 278.

¹⁰ Supra, p. 194.

It is therefore submitted, that not only Lady Elizabeth Sewell's vested remainder in one fourth of her mother's one-third share, but also her contingent remainders and interests in two other fourth parts of her two aunts' two thirds, were bound by the deed of 1779. So that three twelfths, at least, of the Daly estate, now represented by three fourths of the third part allotted to Lady Elizabeth in severalty in 1809, — excepting only therefrom her share of what fell in upon the death of her sister Matilda in 1788, — was, upon the * execution of the settlement of * 222 1779, bound thereby. If her contingent interest in the one twelfth which fell in on Matilda's death did not also pass under that deed and the fines, it was unquestionably included, together with the other three twelfths, in the new settlement and declaration of uses made by the deed of 1825, and the recoveries suffered in pursuance thereof. Upon the partition made between Lady Elizabeth and her surviving sisters, under the decree made in 1809, the one third of the whole estate was allotted to her in severalty, and by indentures then executed, the same was conveyed to trustees, upon the same trusts as her undivided third part of the same estate had before stood limited. In the suit of *Lancray v. Duffield*, instituted in 1812 by the representatives of the trustees of the term in the deed of 1779, for payment of the scheduled debts, they claimed title to the whole of the one third so allotted to Lady Elizabeth as comprised in that term. She, in her answer, submitted that one fourth only of the one third was affected by that deed, but the Master, under an order of reference in that suit, found that the whole of the one third was subject to the trusts of the term. That report was not excepted to, whence it must be inferred that she acquiesced. The report was accordingly confirmed, and under the decree then made, parts of the one third were sold. Then came the deed of January, 1825, which has been said to have for its object, only to subject to the trusts of the term of 1000 years, and thereby to make a good title to the purchaser of, three town-lands, that were not expressly mentioned in the deed of 1779. But though these were not expressly named in that deed, they were included in other towns lands that were named, and were bound accordingly. Whatever was * the object of the deed of 1825, it is plain, from its re- * 223 citals, and from its peculiar expressions and structure, that it was the intention of the parties to comprise in it two

classes of lands, first, the three omitted town-lands, supposed to be unaffected by the deed of 1779, and, secondly, all the rest of the lands which were assumed or intended to be subject to the trusts of that deed, and which were in fact conveyed by this deed of 1825 to the uses of the settlement of 1779. The whole therefore of Lady Elizabeth Sewell's share and interests in the Daly estate, including her share of the part that fell in on Matilda's death, passed to the respondents under that settlement, and nothing remained to be disposed of by her will.

Mr. Turner, in reply. — The argument for the respondents, founded on the cases of *Boreton v. Nicholls*,¹ and *Jack v. Fetherstone*,² and on passages in Preston's Abstracts, and on Butler's note to Fearné,³ "that the limitation over being behind, or engrafted on, an estate tail, previously limited, was a contingent remainder, and therefore not void for remoteness," is answered by the unquestioned authority laid down in Fearné's text before mentioned,⁴ "that any limitation in future or by way of remainder of lands of inheritance, which in its nature tends to a perpetuity, even though there be a preceding vested freehold, &c. is considered as void in its creation." It must have been assumed at the creation of the limitation in the deed of 1752, that the sons of the settlor's daughters would have issue female as well
 * 224 as male, but there was no gift to * their female issue, yet while such issue existed, though for centuries, the limitation over, being on the failure of issue generally, could not take effect. This point did not rest on Fearné's authority only, but on numerous decisions, as *Banke v. Holme*,⁵ and *Morse v. Lord Ormonde*, *Bristow v. Boothby*, and *Hartopp v. Lord Carbery*, before cited, to which no answer has been given —

[THE LORD CHANCELLOR. — Yes; that they are not cases of remainders at all.]

The principle of the decisions, as appeared from the observations of the Judges, is, that unless a limitation be, on the face of the deed, so expressed that it cannot possibly transgress the rule against perpetuities, it is void; it cannot be made good by the happening of the event which is a mere accident, as was said by Lord Lyndhurst in *Lord Dungannon v. Smith*.⁶

¹ Cro. Car. 363.

² 2 Hudson & Brooke, 320.

³ Supra, pp. 217, 221.

⁴ Supra, p. 204.

⁵ 1 Russell, 394 note.

⁶ 12 Clark & Finnelly, at p. 623.

The appellant never contended that, supposing the limitation to be good, there were not cross remainders thereby created as to the original shares of the settlor's daughters among their daughters; his position was, that there were no cross remainders as to the accruing shares, and that the daughters of Lady Louth took no interest by way of cross remainders in the moiety of a third of the whole estate, in which Lady Kerry, the last survivor, had a life interest, from the time of Lady Kingsland's death, but that it fell into the inheritance. To read "survivor" as "other" was a forced construction, not warranted by the context of the deed nor by any just inference of the intention of the settlor.

The recitals in the deed of 1779 did not warrant the construction that Lady Elizabeth intended to convey any interests beyond the one fourth of the one third, * that is, the one * 225 twelfth "then vested" in her. The word "seised," which was also used in the recitals, could not be construed, in a deed, to apply to contingent interests. The argument that her contingent interests also passed by the fines, by way of estoppel, was not sustained by the cases that were cited, of *Lower v. Weale*,¹ and *Vick v. Edwards*,² according to Fearne's statement of those cases.³ The case of *Rowe v. Power*,⁴ in this House, is applicable. There it was held that a contingent interest was not barred by a recovery.

At all events, the appellant must be held entitled to one thirty-sixth part of the estate which was Lady Elizabeth Sewell's share of the one twelfth that fell in on the death of Lady Matilda in 1788. That could not be comprised in the deed of 1779, nor in the deed of 1825, as no interest was included in the latter that was not comprised in the former deed, except the three town-lands that were omitted therefrom.

[*Mr. Turner*, in the course of his reply, again referred to the cases that were cited on the principal points of the case, including some which have not been before mentioned, as *Wilmot v. Wilmot*,⁵ and *Winterton v. Crawford*,⁶ on the word "survivors"; *Doe v. The Earl of Scarborough*,⁷ on the operation of a fine on contingent

¹ Pollexfen, 54.

² 3 P. Wms. 372.

³ Pages 356, 365.

⁴ 2 New Reports, 8.

⁵ 8 Ves. 10.

⁶ 1 Russell & Mylne, 407.

⁷ 3 Adolphus & Ellis, 2 and 41.

remainders ; *Bagshaw v. Spencer*,¹ on the effect of a recovery suffered ; *Vanderplank v. King*,² on survivors and on cross remainders. The reply to the arguments on the effect of estoppel * 226 * is omitted, and the arguments themselves are only touched on in the report, as they were not at all noticed in the judgment.]

August 21.

THE LORD CHANCELLOR. — In this case the first question is, whether the gift over upon failure of issue of the daughters is too remote.

On the 5th of February, 1752, Peter Daly settled estates upon his three daughters for life, as tenants in common, with remainder to their first and other sons in tail male, respectively ; if there were no such heir male to any, then life estates in those shares were given to the survivors, with remainder to their first and other sons in tail male ; if all died without issue male, the estates were given to the daughters respectively, as tenants in common in tail general ; if any died without issue, they were given to the daughters of the survivors, as tenants in common in tail general ; if all died without issue, remainder over.

It is said that this last limitation is too remote, because, there being no previous limitation to issue generally, there might be a failure of all the prior limitations, and yet issue, as in the case of a son of a daughter, might exist, so that this last limitation would not take effect. But if this be a remainder, it would be barable, and the objection, therefore, would not arise.

The rule is to construe the limitation as a remainder, if possible ; *Carwardine v. Carwardine*.³ What then prevents this being a remainder ? Assuming the words to receive their strict construction, the limitation would be this : to each daughter for * 227 life, with remainder * to the sons of each daughter, if any, in tail male ; then, if no sons, to other daughters for life ; remainder, if no sons of any, to daughters of the daughters in tail general ; remainder to daughters of surviving daughters in tail general. But to this last is added a condition that it is to take place only if there be no issue of the daughters, and not only a failure of sons and daughters. But does the interposing of this condition

¹ 2 Atkyns, 570, 578.

² 1 Eden, 27.

³ 3 Hare, 1.

convert this remainder into a shifting use? In the case of *Jack v. Fetherstone*,¹ decided by the Courts of Common Pleas and Exchequer Chamber in Ireland, it was held that it was a remainder, and rightly so held. The whole is a series of gifts to take effect upon the death of each daughter, or upon the failure of the prior limitations, all of which are estates tail; but the last has a particular contingency attached to it. So had the cases referred to by Sir Edward Sugden, in *Fearne*,² and in *Leonard*.³ It is therefore a contingent remainder, and barable; *Nicolls v. Sheffield*⁴ is in point.

The next question is, whether the daughters of Margareta, who died in 1798, became entitled under the deed to the share of Anastasia, who died in 1799 without issue; the gift over, in the event of any daughter dying without issue, being to the use or behoof of the daughter or daughters of such survivor or survivors of the daughters. This is not a question of cross remainders being implied, for cross remainders are distinctly given, but the question is, whether upon the construction of such gift, the word "survivor" is not to be construed "other," and I think it is such a case, * the intention being clear, that all daughters of any daughter should take the share of any other daughter dying without issue. *Doe v. Wainwright*⁵ is directly in point. * 228

Upon the second point I think it clear, that all the estates and interests to which Lady Elizabeth Sewell was entitled under the limitations of the settlement of 1752, passed under and were bound by the settlement of the 23d of February, 1779, and the fines levied in pursuance thereof. The case of *Doe v. Oliver*⁶ is decisive.

The last question, as to the effect of the deed and recoveries of 1825, upon the interest in the property, which at the date of the deed of 1779 belonged to Matilda, who did not die till 1788, is certainly one of some difficulty, arising from the fact that in 1825 the true state of Lady Elizabeth Sewell's (then Russell) title does not appear to have been distinctly understood.

¹ 2 Hudson & Brooke, 320.

² 2 Brown C. C. 215.

³ Page 6.

⁵ 5 Term Rep. 427.

⁶ Vol. 4, p. 237.

¹⁰ 10 Barnewall & Cresswell, 181.

In 1809 there was a partition of the Daly estate, and one third was decreed to belong to Lady Elizabeth, which was correct, and in 1812 the trustees of a term created by the deed of 1779, filed a bill for raising the money charged upon such term; and upon a reference to the Master to inquire what lands were comprised in that term, the Master reported, in 1820, that the term applied to the whole of the one third, and a decree accordingly was made for the sale of a sufficient part of such one third.

With this decision, as to the state of her title to the one third of the Daly estate, namely, that it was all comprised in the * 229 deed of 1779, Lady Elizabeth, in * 1825, suffered recoveries of the property, described in terms comprehending the interest in question, but with the additional description of being comprised in the deed of 1779; and the question now is, whether the share which was vested in Lady Matilda, at the date of the deed of 1779, and was therefore not included in that deed, was affected by the deed of 1825. Upon this subject, I concur in the judgment of Sir Edward Sugden, and with less doubt than he expressed.

The description of the property in the deed is large enough to include every interest therein, and is expressed to be "as to Lady Elizabeth's estate and interest therein," and at that time the estate and interest now in question was in her, and she had been told, by the decree in the partition suit, that the whole of such estate and interest was comprised in the deed of 1779; and this deed of 1825, therefore, so describes it, in addition to the more general description, but that inaccurate description cannot take out of the operation of the deed an estate and interest comprehended in the general description, and which, it is clear, she intended to include in it.

Upon all the points, therefore, I think that the Judges of the Court of Common Pleas in Ireland and Sir Edward Sugden, came to a just conclusion, and that the appeal must be dismissed, with costs.

LORD BROUGHAM. — I entirely agree with my noble and learned friend in the view which he has taken of this case, and I agree also in the certificate of the Court of Common Pleas upon the case sent to them, and in the judgment that was afterwards * 230 come to by the learned Lord Chancellor of * Ireland upon

that certificate being returned, in which the learned Judges expressed their opinion upon the three points referred to them by the Lord Chancellor.

On looking at the learned and able arguments in the Court below, as reported,¹ which I have read carefully, I was a good deal surprised to find that there was a question raised about the remoteness of the limitation. Now, whatever doubt may have arisen in the earlier periods of the learning of the law of contingent uses, whatever confusion of expression, perhaps, rather than of substance, may be found in the reports, giving rise to an impression that there is in such a case a rule similar to the rule with respect to perpetuities in the case of springing uses and executory devises, which, on account of the law respecting perpetuities, may be too remote ; whatever difficulty, confusion, or doubt may have arisen in earlier cases as to this, I am quite confident that for upwards of a hundred years the rule has been settled, as will be clearly seen if you search through the authorities. I have been led to do so from the curiosity of the case, and from seeing that the learned gentlemen, particularly Mr. Serjeant Warren, who argued this case below, raised the point, and, therefore, we would suppose that there must be some foundation for it ; I wished, therefore, to trace what that foundation was, because it opened to my mind a new and a strange view of the law, applying that to contingent remainders which I had always understood must be, from the very nature of the thing, confined to springing uses and executory devises : and why ? In the case of a contingent remainder, if the limitation is to operate by way of remainder, it must be supported * by a preceding particular estate of freehold, an estate for * 231 life or an estate tail, and it is absolutely useless unless it is to take effect *eo instanti* that the preceding estate determines ; that is the very nature of it, the bond of the existence, if I may so speak, of a contingent remainder.

But then, if I have an estate limited upon a fee, that is to say, an estate to A. and his heirs, and upon the determination of that estate in fee, that is, when the heirs shall cease, then over ; that cannot operate by way of remainder ; it is quite clear that that is void as a remainder, and it is quite clear that if that is to take effect by way of executory devise or springing use (the only way in which it can take effect) there is no end of it. It may be a

¹ 4 Drury & Warren, 1.

perpetuity to all intents and purposes, because if the fee is first limited to A. and his heirs, then, as long as there are heirs, the contingent use, the springing use, or, in the case of a will, the executory devise, cannot come into possession, cannot exist, and cannot be available; consequently, there might be a perpetuity created from the condition of a former use not coming into *esse*, that condition being the general failure of heirs. What is the consequence then? That the law has said, "to prevent the possibility of this perpetuity, we will fix certain bounds, beyond which the limitation shall not take effect." Therefore, there may be an estate given to A. and his heirs; that is a fee; but you cannot limit a remainder upon that. If you give an estate to A. and his heirs, and for want of such issue, or if A. shall die without heirs during the life of B., then over, that will do, that will operate by way of springing use or executory devise, because the life of B.

limits the period during which that shall be held *in suspensio*,

* 232 and that is the origin of the rule. In the same * way, I will take the ordinary case of a fee limited upon a fee, that is, a fee to come into use, to come into possession upon the determination of the estate of A. and his heirs, living B.; that prevents the perpetuity, because it limits the period to dying during the life of B.

But suppose another instance of an executory devise or springing use; suppose I give an estate to commence *in futuro* (and a case of that kind is to be found in the books); if there is an estate for life given to A., and one year after to B.; the Courts say, "No; you cannot do that"; and this was the origin of the application of the rule, because if it may be one year after the life estate of A. terminates, it may be a thousand years, and so it might end in a perpetuity. But, however the law has settled that, it must be only for a life or lives in being, and twenty-one years after, and no more. That has been found to be the law first, I think, properly and justly recognised in *The Duke of Norfolk's Case*,¹ in the end of the century before the last, but subsequently more effectually recognised in a case which I heard here, when I held the Great Seal. The famous case of *Cadell v. Palmer*,² in which we had the benefit of the attendance of the learned Judges, and in which, for the first time, it was authoritatively laid down, that without regard to the origin of the rule against perpetuities, you may tie

¹ 3 Chanc. Cas. 1.

² 1 Clark & Fennelly, 372.

up a bequest by way of executory devise,—and consequently a limitation in a settlement by way of springing use,—for a life or lives in being, and for twenty-one years longer. And as I had often heard ventilated the notion that there could be no such thing as a term in gross, at all, * of twenty-one years, I put * 233 the question expressly to the learned Judges (and in the judgment I gave in the case, I argued it upon that ground), namely, can there, without the least regard being had to the fact out of which the rule arose (for that is the origin of the rule), without the least regard being had to the fact of the heir of A., the life or last of the lives in being, not being able to cut off or to bar the remainder, by suffering a recovery or levying a fine, till he is twenty-one,—without any regard to that, but supposing there to be no question of the heir at all; supposing there to be no question of levying a fine or suffering a recovery, or barring the remainder over at all, can by law the life or lives in being have the addition of a term in gross of twenty-one years? The Judges held that that is now the law, whatever may have been its origin. It most clearly arises from a mistake. The law never meant to give a further term of twenty-one years, much less any period of gestation. The law never meant to say that there shall be twenty-one years added to the life or lives in being, and that within those limits you may entail the estate, but what the law meant to say was this: until the heir of the last of the lives in being attains twenty-one, by law a recovery cannot be suffered, and consequently the discontinuance of the estate cannot be affected, and for that reason, says the law, you shall have the twenty-one years added, because that is the fact and not the law, namely, that till a person reached the age of twenty-one he could not cut off the entail. For that reason and in that way it has crept in by degrees; *Communis error facit jus*; and that rule never was applied more accurately than in *Cadell v. Palmer*.

I have said this much upon the ground, and the * only * 234 ground, upon which this case has been argued. But, my Lords, this is not the case of an executory devise in which any argument against perpetuity on the ground of remoteness can be raised, and the doctrine of remoteness has been therefore, I think, most erroneously imported into this case, with which it can have nothing whatever to do, because it cannot be an executory devise,

if it can operate by way of contingent remainder ; and there cannot be remoteness created here, because the preceding estates tail are all barable ; at all events, you have the most perfect security against a perpetuity ever creeping into it, because if it is a contingent remainder, it must take effect on being barable, and it is gone forever *eo instanti* that the particular estate arises. The law upon that subject is not confined to the case of *Carwardine v. Carwardine*,¹ which was only decided in 1757 by the very able judgment of Lord Northington, but long before that, it had been understood, and a great deal of learning upon the subject is to be found in former cases ; if I recollect rightly, they are mentioned in Saunders, but certainly in Mr. Serjeant Williams's notes to Saunders ; and in various cases it has been held, and that is now a great landmark of the law, that whatever use can operate by way of remainder shall never be held to operate by way of executory devise.

My noble and learned friend also called your Lordships' attention to the other point in the case, that is, with respect to the expression "survivor or survivors." Now, certainly, I am of opinion that there is no ground for saying, for I have watched it
 * 235 very narrowly, * that Lord Eldon threw any discredit upon the doctrine which has been laid down in other cases, viz. that "survivor or survivors" may, regard being had to the circumstances, operate as the word "other" or "others." I find that Lord Eldon, in *Davidson v. Dallas*,² is supposed by the learned reporter (but I think most erroneously supposed) to have thrown discredit upon that principle. Sir E. Sugden very justly observes that, though Lord Eldon may have had doubts upon it, he always decided according to it, — he always adopted it, — a thing which I have not unfrequently known to happen to that most able and learned Judge, that though he might carp at a principle which had been recognised, he was very slow in overruling it if it had been once adopted. But on looking into that case I find that what Lord Eldon says is this, "The Judges of the Court have, under the necessity of construction, had recourse to the reading of 'survivors' as 'others' instead of 'survivors,' where the parties have not survived at the time in question, under the pressure of construction, to effectuate the plain meaning of the parties, and

¹ 1 Eden, 27.

² 14 Ves. 576.

that there might not be a complete failure of the accomplishment of that purpose." That is what his Lordship says ; but he does not anywhere say that he disapproves of the principle. Now, my Lords, I never saw a case in which that was more completely carried into effect than in the present case, and I entirely agree with my noble and learned friend, who is more clear upon this subject than the learned Lord Chancellor of Ireland. I do not see any reason for the doubt and hesitation with which he seems to have arrived * at that conclusion. The only point which * 236 I had any doubt about was upon the one fourth of the one third, Lady Matilda's portion, but when I come to look at that, it is evident that it would clearly defeat the very design and object and frame of the instrument if you were to open it.

Then it is said in the Court below that this is a settlement and not a will, and what signifies the intention in a settlement? My Lords, there never was a greater fallacy, and I think I must take this opportunity of reprehending the fallacy, of saying that we are not to construe a settlement or any other instrument *inter vivos* in the same way as we should construe a will, but that we are to adopt a totally different rule of construction in the two cases ; in other words, that we are to attend to the intention in the case of a will, and not to care for the intention in the case of a settlement. If there are not certain words used which have acquired a technical meaning, it is a different thing ; for example, if there are no words of limitation used, you are not to say, there is an estate tail created, but only an estate for life. But it cannot be said that if I give an estate in Blackacre to A., in a settlement, that will not do to carry a fee, that will only be an estate for life, because there are no words of inheritance ; but if I give all my estate in Blackacre to A. in a will, that will do to carry the fee. If any one had gone so far as to contend for that proposition, we should have found no great difficulty in disposing of it. But when a man says in his will, " I give all the estate I have to A., now being in the occupation of John Noakes " (which is clearly demonstrative of the nature of the limitation, and is a clear description * of the particular property that he meant to give), it is too * 237 late to deny or to doubt, and the Courts have so held ; and that is now the law, that in a will that carries the fee, without the assistance of words of inheritance, that a fee would pass by " all

my estate in Blackacre, farmed by J. Noakes." That would, no doubt, be the case, because there are certain words which have, by technical construction (for it is merely technical), in the case of a will, a certain meaning given to them, which meaning is not given to them in the case of a settlement. I recollect when I was arguing a case before Lord Ellenborough, happening to use the argument of the difference between a deed and a will, and Lord Ellenborough's observation was this, "What? Are we not to look at the meaning of the parties? Are we to make nonsense of the words that they use? Are not we rather to take a construction which effectuates their purpose and accomplishes their object, than a construction which defeats it? Most certainly you are to do so, admitting at the same time the technical difference of the rules in the one case and in the other." You are clearly, said his Lordship, to get at the intention of parties in a deed as well as in a will, though rules have been adopted for getting at their intention differently in a will.

Upon the whole, I entirely agree with my noble and learned friend, that there is no reason for doubt in this case; that the Judges of the Court of Common Pleas, in their certificate, took a sound view of the question, and that your Lordships ought to affirm the judgment of the Court below, which judgment appears to have been given with some hesitation, and with more reluctance, I might say, than my noble and learned friend seemed to entertain, * 238 and that hesitation on the part of * the Lord Chancellor of Ireland I could not quite understand, and I wanted to look into his edition of Sanders to see whether he had ever committed himself by any opinion he had there expressed; for when persons come upon the Bench, they sometimes feel a little remains of the author about them, as we have seen in more Judges than one, in one case in particular of a late most learned Judge upon Bills of Exchange, who has frequently shown instances of remembering his former statements, perhaps more than we should have wished to have seen, and that, I thought, might have been the case here, but I have not found any thing to warrant that impression.

The decree was affirmed, with costs.

* THORNEYCROFT v. CROCKETT.

* 239

1847. March 18, 22. 1848. August 21.

GEORGE BENJAMIN THORNEYCROFT, *Appellant.*
 ROBERT CROCKETT, THOMAS GARNIER, and others, } *Respondents.*
 and CHARLES EDWARD RADCLYFFE and others, }

Mortgages. Tacking. Accounts, with Rests.

H. C. mortgaged the entirety of freehold, and part of copyhold, hereditaments to secure payment of 6500*l.* M. C., who was the owner of two thirds of the freeholds, received two thirds of the 6500*l.*, and he and his wife joined in collateral securities for payment of the whole sum. H. C. afterwards paid 500*l.* of the mortgage debt, and, subject thereto, conveyed his one third of the freeholds to secure payment of 12,000*l.* M. C. subsequently mortgaged his two thirds of the freehold hereditaments to secure payment of 2106*l.* The first and last mortgages were assigned to G. B. T., who filed his bill for redemption or foreclosure :—

Held,—affirming the decree of the Vice-Chancellor of England—

1*st.* That G. B. T. was not entitled to tack the last mortgage to the first :

2*d.* That the accounts of the rents and profits of the mortgaged premises, possessed by G. B. T., should be taken against him, with annual rests, if they should be found to have exceeded the interest on the mortgages.¹

For form of a decree directing successive redemptions or foreclosures, and also splitting the equity of redemption, see p. 245 *infra*.

The separate estate of M. C.'s wife was not affected by her joining in the securities.

HENRY CROCKETT, by an indenture of demise for one thousand years, dated the 11th of December, 1821, mortgaged a freehold estate at Willenhall, in the county of Stafford, to Messrs. Legge, Lloyd, and Woolley, bankers in Birmingham, to secure payment of a loan of 6500*l.*, with interest at 5*l.* per cent. ;

* and for further security, he covenanted to surrender to * 240 their use his undivided third part of a copyhold estate at Willenhall, subject to redemption on payment of the said sum and interest. By another indenture, of the same date, made between John Murhall Crockett and Frances his wife, and the trustees of their marriage settlement, of the first and second parts, and Legge, Lloyd, and Woolley, of the third part, an annuity of 200*l.*, to which the said Frances was entitled for her separate use,

¹ See McDonnell v. White, 11 House of Lords Cases, 570, 577.

during the joint lives of her and her said husband, and their equitable interests in two undivided third parts of the said copyhold estate, limited in their marriage settlement on trust to the husband for life, with remainder to the wife for her life, were assigned and conveyed to Legge, Lloyd, and Woolley, as a collateral security for the repayment of the said sum and interest.

By an indenture, dated the 6th of February, 1822, and made between the said Henry and Murhall Crockett, the former declared that he, his heirs and assigns, did and would stand seised of two-third parts of the freehold estate comprised in the said indenture of demise, in trust for the latter, his heirs and assigns, subject to the mortgage and payment of the two thirds of the principal and interest thereby secured: And Murhall Crockett acknowledged that 4333*l.* 6*s.* 8*d.*, being two thirds of the said sum of 6500*l.*, had been received by him for his own use and benefit.

In November, 1826, Henry Crockett paid 500*l.* of the mortgage debt, and by an indenture of that date, Legge, Lloyd, and Woolley, in consideration thereof, and of 6000*l.* paid to them by Thomas Baldwin, assigned the demised premises to him, his executors, administrators, and assigns, for the residue of the said
 * 241 term; and Henry Crockett covenanted to surrender * to the use of him, and his heirs, the copyhold premises comprised in the first mortgage deed of 1821, subject as to both freeholds and copyholds, to redemption, on payment to Baldwin, his executors, &c. of the 6000*l.*, with interest at the aforesaid rate. By another indenture of the same date, Mrs. Frances Crockett's annuity, and the equitable life interests of her and her husband, comprised in the said second deed of 1821, were transferred to Baldwin and his heirs for like collateral security, subject to redemption as aforesaid.

By indentures of lease and release, dated respectively the 20th and 21st of May, 1831, and made previous to the marriage of the respondents, Charles Edward Radclyffe, the elder, and Laura, his wife, Henry Crockett's one undivided third part in the freehold premises, comprised in the mortgage deed of 1821, was conveyed, subject to the residue of the term of 1000 years, and to the mortgage debt, to Thomas Garnier, William Garnier, and Antony Chester, and their heirs, in trust to permit Henry Crockett to receive the rents and profits during the life of the said C. E. Radclyffe, and after his death, to raise, by sale or mortgage, such sum of money

as, together with the sum that might be actually recovered or received upon three bonds,—one by Henry Crockett, for 3000*l.*, the second by him and his brother, Robert Crockett, for 1999*l.*, and the third by Murhall Crockett and his son, for 1000*l.*,—and with the sum that would arise from the sale of certain leasehold property of the said C. E. Radclyffe, should make up the principal sum of 12,000*l.*; and after such sum should be raised, together with the costs incurred therein, and in the mean time subject to the trusts thereof, in trust for Henry Crockett, his heirs and assigns.

* By a memorandum indorsed on the deed of release, and * 242 of even date therewith, under the hands and seals of the said Henry Crockett, C. E. Radclyffe, and Laura, and of the Reverend William Garnier, her father, it was declared that it should be lawful for Henry Crockett, his heirs, executors, &c. at any time thereafter, to sell, lease, and dispose of the said one undivided third part, or any part thereof, either in fee simple or for a term of years, the said trustees (the respondents, Thomas Garnier, and others), receiving a moiety of the net proceeds arising from such sale, lease, &c. to be held by them on the trusts of the last-stated indenture of release, and of another indenture of even date, whereby it was declared, that the said trustees were to hold the said sum of 12,000*l.*, when recovered, together with the other sums therein mentioned, for the benefit of the respondents, C. E. Radclyffe and Laura his wife, respectively, and after the death of the survivor of them, for the benefit of the child or children of the marriage.

By an indenture of release, dated the 29th of January, 1833 (founded on a lease for a year), to which Henry Crockett, Murhall Crockett, and Frances, his wife, and their eldest son, Molineux Crockett, were parties; and by a recovery suffered in pursuance thereof, Murhall Crockett's two undivided third parts of the freehold premises, comprised in the deed of 1821, were conveyed to George Capes, his heirs and assigns, to hold the same, subject to the residue of the term of 1000 years, and the payment of the said sum of 6000*l.* and interest, to such uses as Murhall Crockett and his said son should, during their joint lives, appoint, as therein mentioned; and in default of such appointment, to the use of Murhall Crockett, * for his life, remainder to the uses * 243 of the said Molineux Crockett, for his life, with remainder to his heirs and assigns forever.

Henry Crockett, in April, 1833, died intestate and without issue, leaving the respondent, Robert Crockett, his eldest brother, his heir at law and customary heir.

In July, 1833, the said trustees (Garnier and others) caused several actions to be brought against Murhall and Molineux Crockett, upon their said bond for 1000*l.*, and against Robert Crockett on the bond for 1999*l.*, and judgments were obtained, in January, 1834, to the amount of the penalties of the bonds. These judgments were registered according to the Act 1 & 2 Vict. c. 110, § 19.

By indentures of lease and release, dated the 7th and 8th of August, 1833, Robert Crockett, as heir of Henry Crockett, and the said Murhall and Molineux Crockett, conveyed Murhall Crockett's said two undivided third parts of the freehold premises, comprised in the first mortgage transferred to Baldwin, subject thereto, to the use of Messrs. Attwood and Spooner, bankers in Birmingham, their heirs and assigns, subject to redemption on payment of 2106*l.* 7*s.* 7*d.*, stated therein to be due to them from Murhall Crockett, with 5*l.* per cent. interest.

This mortgage was, by an indenture of the 16th of January, 1838, assigned to the appellant, his heirs and assigns, in consideration of 800*l.*; and by an indenture dated the 18th of the same January, Baldwin, in consideration of 6990*l.* 11*s.* 8*d.*, assigned to the appellant, his heirs and assigns, the principal sum of 6000*l.*, due to him on the security of the indenture of November,

1826, and 990*l.* 11*s.* 8*d.*, due for interest and costs up to * 244 May, 1834, and all the covenants of * Henry Crockett and others, comprised in the said indenture, for better securing the payment of the said sum. And by another indenture of the same date, Mrs. Frances Crockett's annuity of 200*l.*, and her and her husband's equitable life estates in the premises mentioned in the second indenture of the 11th of December, 1821, which had been transferred to Baldwin, were by him assigned to the appellant.

The appellant filed his bill against Robert Crockett, Murhall Crockett, and Frances, his wife, and their son Molineux Crockett, and against the respondents Thomas Garnier and his co-trustees, and their *cestuis que trust*, Mr. and Mrs. Radclyffe and their only child,—and against several others, as against whom the

bill was afterwards dismissed with costs, as disclaiming all interest.

The bill, after stating the various indentures and matters before stated, and that Murhall Crockett had been declared an insolvent, and his real and personal estates were vested in assignees, defendants thereto, prayed that accounts might be taken of the principal and interest due on the two mortgages comprised in the indentures of the 16th and 18th of January, 1838, and that what should be found due to the appellant might be paid by the defendants, or some of them, and that in default thereof, they might be foreclosed from all equity of redemption in the mortgaged premises.

The respondent, Robert Crockett, and the defendants Murhall Crockett (who died soon afterwards) and Frances, his wife, and Molineux Crockett, by their answers, admitted the several mortgages and transfers, and that the principal sums of 6000*l.* and 2106*l.*, with arrears of interest, were due to the appellant.

The respondents, Thomas Garnier and his co-trustees * (except Richard Crockett) and the *cestuis que trust*, E. * 245 C. Radclyffe and wife, and their only child, by their answer, after stating the indentures of May, 1831, and that they were strangers to the mortgage to Attwood and Spooner in 1833, and also stating the said judgments obtained against Robert, Murhall, and Molineux Crockett, claimed such rights and interests as they might appear entitled to by virtue of the said indentures.

The said Richard Crockett, by his answer, stated that he neither executed nor acted under the indentures of May, 1831. (It appeared, by an indorsement on them, that he had formally renounced the trusts.)

The question raised on the hearing of the cause before the Vice-Chancellor of England, in 1842, was, whether the appellant was, as his counsel contended, entitled to tack the mortgage for 2106*l.* to the mortgage for 6000*l.* The respondents Garnier and others, contended that they were entitled to redeem the mortgage for 6000*l.*, as the only charge prior to their own on the one third of the freeholds, without redeeming the mortgage for 2106*l.*, which affected the other two thirds only; and of that opinion was the Vice-Chancellor, by whose decree, — the minutes of which were much discussed before him, — it was ordered that the bill should

be dismissed as against Richard Crockett, with costs ; and after declaring that the life interest of Mrs. Frances Crockett in the copyholds comprised in the second indenture of December, 1831, and her annuity of 200*l.*, also comprised therein, were not charged or affected thereby, and that the annuity determined by the death of Murhall Crockett—

It was ordered to be referred to the Master, to take an account of * 246 what was due to the appellant for principal and interest, * in respect of the two mortgage securities, dated the 11th of December, 1821, including so much of a sum of 187*l.* paid by him to the solicitor of Thomas Baldwin, upon the transfer of the mortgage securities, as should appear to have been chargeable on the mortgaged premises : And to take an account of the rents and profits of the premises comprised in the first of the said mortgage securities, and of the said annuity comprised in the second, received by the appellant, or which, without his wilful default, might have been received : And in case the Master should find that the appellant had been in the occupation of the said mortgaged premises, or any part thereof, then it was ordered that he should set a value by way of annual rent thereon, and that the appellant should be charged therewith : And it was ordered that the Master should inquire and state whether the appellant had expended any and what sums in necessary repairs and improvements on the mortgaged premises ; and that what he should find to have been so expended should be deducted from what should be coming from the appellant on account of the rents and profits, and annuity and occupation rent ; and in case the annual rents and profits, and annuity received by the appellant, after such deduction, and the occupation rent, if any, to be charged, exceeded the interest due on the mortgage securities of December, 1821, it was ordered that the Master should make annual rests in taking the said accounts ; and that what he should find to be coming from the appellant on account of such rents and profits, annuity and occupation rent, be applied, first, in payment of the interest due on the said mortgage securities, and then in sinking the principal : And it was ordered that the Master should state what should be found due to the appellant for such principal, interests, and costs, after such deduction as aforesaid ; and upon the respondents, Thomas Garnier and his co-trustees under the indentures dated the 20th and 21st of May, 1831, and the respondents, C. E. Radclyffe the elder, and Laura his wife, and E. Radclyffe the younger, or any of them, paying to the appellant what the Master should find due to him for his principal and interest on the said two mortgage securities of December, 1821, together with his costs of suit in respect of the same ; then it was ordered, that the appellant should

* 247 convey all * the mortgaged premises comprised in the first indenture of December, 1821, unto the last-named respondents, or such of them as should redeem the appellant ; but in default of the respondents, Garnier and his co-trustees, and E. Radclyffe the elder, and his wife, and E. Radclyffe the younger, or some of them, paying the appellant what should be found due to him as aforesaid, together with such costs (by a time mentioned), then it was ordered that the last-named respondents should be foreclosed, and in that case, that the Master should compute the appellant his subsequent interest, and take an account

of subsequent rents and profits received by him, or which, without his wilful default, might have been received, and of occupation rent, and also of what was due to him for principal and interest in respect of his mortgage security of the 7th and 8th of August, 1833: And it was ordered that the Master should distinguish what should be found due to the appellant for principal, interest and costs, in respect of the mortgage securities of December, 1821, and divide the same into three equal parts; and upon the respondent, Robert Crockett, paying the appellant what the Master should certify to be one of such third parts; and upon the respondent, Molyneux Crockett, paying him the remaining two-third parts, and also what the Master should find due to the appellant for his principal and interest and costs, in respect of the mortgage security of August, 1833, then it was ordered that the appellant should convey and surrender the one equal undivided third part of the said freehold premises and the whole of the one-third part of the said copyhold premises, comprised in the mortgage security of 1821, to the respondent, R. Crockett, and the remaining two-third parts, comprised in the mortgage securities of December, 1821, and of August, 1833, unto the respondent, Molyneux Crockett, free from encumbrances, and deliver all deeds and writings relating thereto, to the respondents Robert and Molyneux Crockett; but in default of the respondent Robert Crockett paying the appellant such one-third part of the principal, interest, and costs, it was ordered that he should stand foreclosed of all equity of redemption in the mortgaged premises; and in default of the respondent Molyneux Crockett paying to the appellant such two remaining third parts and costs, due in respect of the mortgage securities * of December, 1821, and what the Master should find due for principal, * 248 interest, and costs, in respect of the mortgage security of August, 1833, it was ordered that he, Molyneux Crockett, should be foreclosed: But in case the respondents, Garnier and his co-trustees, and C. E. Radclyffe the elder and Laura his wife, and C. E. Radclyffe the younger, or any of them, should redeem the appellant, it was ordered that the Master should take an account of what was due to them for principal and interest on the indentures of May, 1831, and compute subsequent interest on what they should pay to the appellant; and upon the appellant paying to the last-named respondents what should be due to them, for principal, interest, and costs, it was ordered that the last-named respondents should re-surrender and re-convey the mortgaged premises unto the appellant, free from encumbrances, and deliver up to him all deeds and writings, &c.; but in default of the appellant redeeming them, it was ordered that he should be foreclosed, &c.

The decree then provided for redemption by Robert Crockett and Molyneux Crockett respectively, and, on their default, for foreclosure of them respectively, in similar terms, *mutatis mutandis*, as before stated, having regard to their respective shares and interest in the mortgaged premises; but in case the appellant should redeem Garnier and co-trustees, and Mr. and Mrs. Radclyffe and their son, then it was ordered that the Master should take an account of what might be due to the appellant for principal and interest in respect of the mortgage security of August, 1833, and compute subsequent interest on what he should pay the last-named respondents, and take an account of the subsequent rents and profits received by the appellant, or which, without his wilful default, might have been received, and of occupation rent (if any); and the decree

thereupon provided for redemption by Robert Crockett and Molyneux Crockett respectively, and on their default, for foreclosure of them respectively, in similar terms, *mutatis mutandis*, as hereinbefore stated, having regard to their respective shares and interests in the mortgaged premises: And in the said decree were contained corresponding directions for taxation of costs, and the usual directions for the production before the Master of all deeds and writings, and for the * 249 examination of the parties, and for making them all just * allowances, with liberty to apply: And the decree was declared to be binding upon the infant, C. E. Radclyffe the younger, unless he should show cause against the same within six months after he should attain the age of twenty-one.

The appeal was against that decree.

Mr. Turner and *Mr. Faber* for the appellant: —

The decree is erroneous, in the first place, in directing an account to be taken of what the appellant received, or, without wilful default, might have received, of Mrs. Crockett's annuity, inasmuch as it was not averred in the pleadings that he was ever in the receipt of it; and that being only a collateral security, the appellant was not guilty of any default in not recovering it.

The next and principal objection to the decree is, that it lets in the respondents, the Radclyffes, and their trustees under the deed of May, 1831, — which constituted a charge only on one undivided third part of the freehold property, — to redeem the appellant's first mortgage, created by the indenture of December, 1821, which comprised the entirety of that property, without also redeeming the appellant's second mortgage of December, 1833, which comprised the other two undivided parts. The appellant's bill stated a case clearly entitling him to a decree of foreclosure against all the parties interested, unless they, or some of them, paid the principal and interest due on both his mortgages, with his costs of suit. At all events, the respondents, the Radclyffes and their trustees, whose share was confined to the one-third part of the freehold estate, ought not to be admitted to redeem more than that part. The successive redemptions in this very * 250 * complicated case should have been directed on the principle of the decree in *Sambroke v. Hanbury and Holingworth*, splitting the equity of redemption in the first mortgage.¹ The case of *Titley v. Davies*,² often referred to as a guide in questions like the present, is quite applicable.

Should this decree, however, appear right in form, it ought, at

¹ Seton's Decrees, 162.

² 2 Younge & Collyer C. C. 399.

all events, to be varied in respect to the direction to take the accounts against the appellant, with annual rests, a direction which is seldom given against a mortgagee in possession, and never except under very special circumstances. There were large arrears of interest due on these mortgages when the appellant got possession. *Davis v. May*,¹ *Latter v. Dashwood*,² *Finch v. Brown*,³ and *Wilson v. Cluer*,⁴ were cited against the direction.

Mr. Stuart and *Mr. T. W. Greene* for the respondents, the Garniers and Radclyffes.

Of the points now made by the appellant, one only was argued in the Vice-Chancellor's Court, and that is raised in the appeal case. The decree was drawn up on minutes settled and agreed to after much discussion. The point, as to rests in the accounts, is not raised in the appeal.

[THE LORD CHANCELLOR. — Unless it can be shown that the minutes were settled by consent, there must be something extraordinary in directing an account with annual rests. The appeal, however, being against the whole decree, is large enough to comprise this point.]

Appeals cannot be properly argued, if the points to * be * 251 made are not put forth openly and fairly in the appeal cases. Besides, this point was not made before the Vice-Chancellor. There was no discussion whatsoever upon it. The registrar drew up the decree in the usual form. The appellant not having drawn the attention of the Court below to this point, ought not to be allowed to raise it now.

The only substantial question between the parties was, and is now, whether the Radclyffes have not a right to redeem the appellant's first mortgage, which is the only charge on the one third of the estate prior to their own. The appellant has not made any case for tacking, as against these respondents, the mortgage of 1833 to that of December, 1821, so as to exclude their intervening security of 1831. That security, although affecting only one undivided third part of the property, is made by the same mortgagor, under the same title as the first mortgage, and as the first mortgagee might have wished that second could not compel him to allow a redemption of one third of the first mortgage, so the de-

¹ 19 Ves. 383.

² 6 Simons, 462.

³ 3 Beavan, 70.

⁴ 3 Beavan, 136.

cree properly orders the second mortgagee to redeem the whole first mortgage, and then authorises the appellant to redeem them on payment by him of what should be due on the 6000*l.* and 12,000*l.*, and the interest respectively ; *Bovey v. Skipwith*,¹ *Ireson v. Denn*,² *Palk v. Clinton*,³ *Titley v. Davies*,⁴ cited for the appellant, is an authority in favour of these respondents.

Mr. Turner, in reply, observed upon the cases cited, saying that *Bovey v. Skipwith* and *Ireson v. Denn* were distinguishable * 252 in their circumstances from the * present case, and therefore inapplicable ; that *Palk v. Lord Clinton*, as far as it had any bearing on that, was an authority in favour of the appellant ; and as to *Titley v. Davies*, it was not only applicable, but decisive of the substantial question in the appeal. The appellant, owner of the first mortgage, comprising the whole freehold estate, should not be compelled to convey the entirety without being paid the principal and interest, with his costs of suit in respect to the second mortgage, which affected two thirds of the same estate. The Vice-Chancellor's decree proceeded on the very principle for which the appellant contends ; for the Radclyffes and their trustees are thereby declared entitled, on paying the first mortgage, to tack to it their charge of 12,000*l.*, and to hold the entire estate until payment be made to them of that sum, together with what they should pay in redemption of the first mortgage, and so postpone the appellant's second mortgage on the two thirds to their charge, which does not affect the two thirds at all. The principle of the cases is, that the mortgages should be redeemed entire, but if the redemption be split, it should be done by making the Radclyffes redeem one third of the first mortgage, and then directing Murhall Crockett's representatives to pay what should be still due to him on the first, and the whole of the second mortgage, or be foreclosed as to the two thirds of the estate.

August 21.

THE LORD CHANCELLOR. — The result of the several deeds brought under the consideration of the House in this case appears to be this : that in December, 1811, Henry Crockett held one third

¹ 1 Chanc. Cas. 201.

² 12 Ves. 48, 59.

³ 2 Cox, 425.

⁴ 2 Younge & Collyer C. C. 399.

of the freeholds for himself, and two thirds in trust for John Murhall Crockett. Henry Crockett * held also one * 253 third of the copyholds; the other two thirds were settled on John Murhall Crockett by marriage settlement, and subject to an annuity of 200*l.* for Frances his wife, during their joint lives.

On the 11th of December, 1821, there was a mortgage of the whole of the freeholds for one thousand years, and of Henry Crockett's one third of the copyholds by covenant to surrender, and of the 200*l.* annuity, to secure 6500*l.* to Legge, Lloyd, and Woolley. Of that sum of 6500*l.*, 500*l.* was afterwards repaid. On the 11th of November, 1826, Legge, Lloyd, and Woolley transferred the mortgage of 6000*l.*, and the other securities, to Thomas Baldwin. On the 18th of January, 1838, the debt then due for principal and interest, amounting to the sum of 6990*l.* 16*s.* 8*d.*, and the securities, were transferred by Baldwin to the appellant, G. B. Thorneycroft.

As to the two thirds of the freehold which belonged to John Murhall Crockett; on the 29th of January, 1833, he settled these two thirds, subject to the 6000*l.* mortgage, upon himself and his son, John Molineux Crockett, subject to their joint appointment. On the 24th of August, 1833, an appointment was made under the last deed, to secure 2106*l.* 7*s.* 8*d.* to Spooner and Attwood, in fee, subject to the 6000*l.* mortgage. On the 16th of January, 1838, Spooner and Attwood assigned their 2106*l.* 7*s.* 8*d.*, and their securities, to the appellant Thorneycroft.

As to Henry Crockett's one third; on the 21st of May, 1831, a marriage settlement of Mr. and Mrs. Radclyffe was executed, by which Henry Crockett conveyed his one third to Thomas Garnier and others, in fee, upon trust by sale, mortgage, or other disposition thereof, to raise sufficient to make up 12,000*l.* upon * the trusts of the settlement. In 1833 Henry Crockett *254 died, and Robert Crockett was his heir.

The appellant, Thorneycroft, being so entitled to the two mortgages of 6000*l.* on the entirety of the freeholds, and of 2106*l.* upon the two thirds thereof belonging to John Murhall Crockett, by his bill, prayed a foreclosure against all the defendants, as well those who claimed under John Murhall Crockett as those who claimed under Henry Crockett, upon non-payment of what was then due upon both the mortgages; and in support of this claim, he contended that he was entitled to tack the 2106*l.* mortgage to

the 6000*l.* mortgage, so as to postpone the charge of 12,000*l.* made upon the one third of Henry Crockett.

The decree gives preference and priority to the 12,000*l.* charged upon the one third of Henry's, and, I think, properly so. The two competing charges of 12,000*l.* and 2106*l.* are not, in fact, charges upon the same property, the first affecting the one third of Henry, and the second the two thirds of John Murhall Crockett, and the deed of the 28th of August, 1833, creating the mortgage for 2106*l.*, recites the instruments showing that Henry and John Murhall Crockett were interested in the estates mortgaged for the 6000*l.* in the share of one third and two thirds, and had received the mortgage money in those proportions, and charges the two thirds only, and reserves the equity of redemption to John Murhall Crockett and his son. There does not therefore appear to be any ground for the claim to tack this mortgage to the first mortgage of 6000*l.* And the parties interested in the 12,000*l.* charged upon Henry Crockett's one third, being so far entitled to

a portion of the equity of redemption reserved upon the * 255 mortgage for 6000*l.*, are * clearly entitled to redeem the whole of it; for they cannot redeem one third of it only, as was decided in *Palk v. Lord Clinton*,¹ and if they shall so redeem the 6000*l.* mortgage, or shall not do so, the directions in the decree as to redemption and foreclosure are, I think, according to the course of the Court.

It was indeed said that as the latter parts of the decree provide for redemption and foreclosure in three parts, the first part of the decree ought to have contained a similar provision. But the reason for the difference is obvious. The mortgage for 6000*l.* affected the whole estate, whereas the subsequent charges affected only portions of the interest in the estate which belonged to Henry and Murhall Crockett in thirds.

It was objected that the bill ought not to have been dismissed with costs as against Richard Crockett. But he, by his answer, says that he never executed or acted under the deed of the 21st of May, 1831, and it appeared, by an indorsement on the deed under date of the 20th March, 1839, that he had formally renounced. That provision in the decree was therefore perfectly right.

It was further objected that the decree treats the appellant as having been in receipt of the annuity of 200*l.*, and directs the

¹ 12 Ves. 48; see p. 59.

account against him accordingly ; and it was argued, in support of this objection, that the charge upon the annuity was collateral only. This is not supported by reference to the deed creating the charge ; for, on the contrary, it appears to have been a primary charge, and equally so as the other property. And although there may not have been any distinct allegation or proof that any payment of the annuity * was received by the mort- * 256 gagee, yet possession of part, at least, of the property in mortgage by the mortgagee, is not disputed. It was said that this objection was not raised before the Vice-Chancellor, although the minutes of the decree were prepared by the plaintiff, and much discussed in Court : and this applies also to the objection now made to the decree for directing the accounts of receipts by the mortgagee, with annual rests. But such rests are only to be made if the receipts shall be found to exceed the interest due. This is certainly the justice of the case, and is no more than what is done by the decree in another form, by directing that the receipts to be applied should be applied, first, in payment of the interest, and then in sinking the principal. The objection to this direction as to rests is not to be found amongst the reasons for the appeal, and if the plaintiff himself prepared these minutes, and did not raise the question before the Vice-Chancellor, this House would be very reluctant to entertain it now, seeing that the direction does no more than justice between the parties. *Davis v. May*¹ was cited by the appellant, but it does not appear what were the facts of that case.

I move your Lordship, therefore, that this decree be affirmed, with costs.

The decree was affirmed accordingly, with costs.

¹ 19 Ves. 383.

1846. July 21, 23, 27, 28 ; August 3, 4, 6. 1848. September 21.

ROBERT COLE BOWEN, a minor, by his mother } *Appellant.*
and next friend, }
JOHN EVANS and others, *Respondents.*

Purchase under a Decree, impeached for Fraud, not proved. Lapse of Time. Principles of Equity in Case of Fraud.

Upon a bill filed by a remainder-man in tail, to set aside a sale of lands, made nearly fifty years before under a decree — in a suit by a judgment creditor, to carry the trusts of a will into execution, and for the administration of the testator's estate — on the ground of irregularities and error in the proceedings, and fraud in the sale : —

Held, by the Lords, affirming the decree complained of, that, in the absence of proof of fraud on the part of the purchaser, or that the estate was sold under the value by reason of any corrupt bargain, the sale was not impeachable.

A purchase under a decree, not impeachable when made, cannot become so from any irregularities in the subsequent conduct of the cause, or errors in dealing with the purchase money.

After a long lapse of time since the transactions complained of, there having been parties *in esse* competent to impeach them, fraud is not to be assumed on doubtful evidence ; but if it be clearly proved, no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of a Court of Equity, and in that case it is immaterial by what machinery or contrivance the fraudulent transactions may have been effected, whether by a decree in equity, or judgment at law, or otherwise.¹

But in proportion as such jurisdiction is powerful, so ought the caution of the Court to be anxiously exercised, lest, in its zeal to do equity, the reverse may be effected.

THIS was an appeal from a decree of Sir Edward Sugden, Lord Chancellor of Ireland (see 1 Jones and La Touche, 178, and 6 Irish Eq. Rep. 569).

*258 * Henry Cole Bowen, by his will, dated in July, 1785, devised his real estates — including the lands of Kilbolane, Bowensford, Meadstown, Carhue, and Garrandrolane, in the county of Cork, and Kilmurry, in the county of Limerick, of all which he was seised in fee simple, and also his freehold estate, held for

¹ See Colyer v. Finch, 5 House of Lords Cases, 905, 915.

lives renewable for ever, in the lands of Kilcummer in the county of Cork — to four persons in the will named, and their heirs, to the use of his eldest son, Henry Cole Bowen, for life, remainder to his first and other sons in tail male, and in default of such issue, to the use of the testator's fourth son, Robert Cole Bowen, for life, with remainder to his first and other sons in tail male; with similar remainders to the fifth, sixth, seventh, eighth and third sons of the testator, and their issue male; and in default of issue male of the sons, to the use of the testator's six daughters (by name), as tenants in common in tail, with an ultimate remainder to his own right heirs.

The testator charged all his estates with portions for his younger children, to be paid to his sons at their respective ages of twenty-one years, and to his daughters upon their attaining that age or marriage, the portions to bear interest at the rate of five per cent. per annum, and no more; and he empowered his trustees to raise the portions, as they should become payable, by sale or mortgage of the estates, or of competent parts thereof; and to raise by like means a sum sufficient to discharge his just debts (which amounted to about 33,000*l.*), and he appointed his wife, and the four trustees, executrix and executors of his will.

The testator died in 1788, leaving his wife, and all his fourteen children mentioned in his will, him surviving.

* The widow alone proved the will. H. C. Bowen, the * 259 eldest son, entered on the receipt of the rents of the devised estates, which were worth 3800*l.* a year.

Shortly after the testator's death, his eldest son caused the estates to be advertised for sale, to raise money for payment of the debts, and he entered into agreements for the sale of some of them. Kilbolane producing a rental of 880*l.*, he agreed to sell for 19,025*l.*, to Mr. George Evans Bruce.

In 1789, Mrs. Catherine Grove, a judgment creditor of the testator for 3500*l.*, filed a creditors' bill in the Equity Exchequer in Ireland, for the general administration of his real and personal estates. The testator's eldest son, the widow and executrix, and the younger children, and other persons, including the trustees, who refused to act in the trusts, were made defendants. The bill prayed that, in case the personal property of the testator should not be sufficient to pay his debts, the real estates, or a competent part thereof, might be sold or mortgaged; and that the trustees

be dismissed as against Richard Crockett, with costs ; and after declaring that the life interest of Mrs. Frances Crockett in the copyholds comprised in the second indenture of December, 1831, and her annuity of 200*l.*, also comprised therein, were not charged or affected thereby, and that the annuity determined by the death of Murhall Crockett—

It was ordered to be referred to the Master, to take an account of * 246 what was due to the appellant for principal and interest, * in respect of the two mortgage securities, dated the 11th of December, 1821, including so much of a sum of 137*l.* paid by him to the solicitor of Thomas Baldwin, upon the transfer of the mortgage securities, as should appear to have been chargeable on the mortgaged premises : And to take an account of the rents and profits of the premises comprised in the first of the said mortgage securities, and of the said annuity comprised in the second, received by the appellant, or which, without his wilful default, might have been received : And in case the Master should find that the appellant had been in the occupation of the said mortgaged premises, or any part thereof, then it was ordered that he should set a value by way of annual rent thereon, and that the appellant should be charged therewith : And it was ordered that the Master should inquire and state whether the appellant had expended any and what sums in necessary repairs and improvements on the mortgaged premises ; and that what he should find to have been so expended should be deducted from what should be coming from the appellant on account of the rents and profits, and annuity and occupation rent ; and in case the annual rents and profits, and annuity received by the appellant, after such deduction, and the occupation rent, if any, to be charged, exceeded the interest due on the mortgage securities of December, 1821, it was ordered that the Master should make annual rests in taking the said accounts ; and that what he should find to be coming from the appellant on account of such rents and profits, annuity and occupation rent, be applied, first, in payment of the interest due on the said mortgage securities, and then in sinking the principal : And it was ordered that the Master should state what should be found due to the appellant for such principal, interests, and costs, after such deduction as aforesaid ; and upon the respondents, Thomas Garnier and his co-trustees under the indentures dated the 20th and 21st of May, 1831, and the respondents, C. E. Radclyffe the elder, and Laura his wife, and E. Radclyffe the younger, or any of them, paying to the appellant what the Master should find due to him for his principal and interest on the said two mortgage securities of December, 1821, together with his costs of suit in respect of the same ; then it was ordered, that the appellant should * 247 convey all * the mortgaged premises comprised in the first indenture of December, 1821, unto the last-named respondents, or such of them as should redeem the appellant ; but in default of the respondents, Garnier and his co-trustees, and E. Radclyffe the elder, and his wife, and E. Radclyffe the younger, or some of them, paying the appellant what should be found due to him as aforesaid, together with such costs (by a time mentioned), then it was ordered that the last-named respondents should be foreclosed, and in that case, that the Master should compute the appellant his subsequent interest, and take an account

of subsequent rents and profits received by him, or which, without his wilful default, might have been received, and of occupation rent, and also of what was due to him for principal and interest in respect of his mortgage security of the 7th and 8th of August, 1833: And it was ordered that the Master should distinguish what should be found due to the appellant for principal, interest and costs, in respect of the mortgage securities of December, 1821, and divide the same into three equal parts; and upon the respondent, Robert Crockett, paying the appellant what the Master should certify to be one of such third parts; and upon the respondent, Molyneux Crockett, paying him the remaining two-third parts, and also what the Master should find due to the appellant for his principal and interest and costs, in respect of the mortgage security of August, 1833, then it was ordered that the appellant should convey and surrender the one equal undivided third part of the said freehold premises and the whole of the one-third part of the said copyhold premises, comprised in the mortgage security of 1821, to the respondent, R. Crockett, and the remaining two-third parts, comprised in the mortgage securities of December, 1821, and of August, 1833, unto the respondent, Molyneux Crockett, free from encumbrances, and deliver all deeds and writings relating thereto, to the respondents Robert and Molyneux Crockett; but in default of the respondent Robert Crockett paying the appellant such one-third part of the principal, interest, and costs, it was ordered that he should stand foreclosed of all equity of redemption in the mortgaged premises; and in default of the respondent Molyneux Crockett paying to the appellant such two remaining third parts and costs, due in respect of the mortgage securities

* of December, 1821, and what the Master should find due for principal, * 248 interest, and costs, in respect of the mortgage security of August, 1833, it was ordered that he, Molyneux Crockett, should be foreclosed: But in case the respondents, Garnier and his co-trustees, and C. E. Radclyffe the elder and Laura his wife, and C. E. Radclyffe the younger, or any of them, should redeem the appellant, it was ordered that the Master should take an account of what was due to them for principal and interest on the indentures of May, 1831, and compute subsequent interest on what they should pay to the appellant; and upon the appellant paying to the last-named respondents what should be due to them, for principal, interest, and costs, it was ordered that the last-named respondents should re-surrender and re-convey the mortgaged premises unto the appellant, free from encumbrances, and deliver up to him all deeds and writings, &c.; but in default of the appellant redeeming them, it was ordered that he should be foreclosed, &c.

The decree then provided for redemption by Robert Crockett and Molyneux Crockett respectively, and, on their default, for foreclosure of them respectively, in similar terms, *mutatis mutandis*, as before stated, having regard to their respective shares and interest in the mortgaged premises; but in case the appellant should redeem Garnier and co-trustees, and Mr. and Mrs. Radclyffe and their son, then it was ordered that the Master should take an account of what might be due to the appellant for principal and interest in respect of the mortgage security of August, 1833, and compute subsequent interest on what he should pay the last-named respondents, and take an account of the subsequent rents and profits received by the appellant, or which, without his wilful default, might have been received, and of occupation rent (if any); and the decree

Martin, as trustee for Bruce, and stating (falsely) that the 19,025*l.* had been paid into the Bank of Ireland, for the purposes in the decree mentioned, the lands of Kilbolane were conveyed to G. E. Bruce, his heirs and assigns. From that time he ceased to pay any interest on the balance of the purchase money, and never afterwards made any payment of the balance or interest thereon.

A negotiation was soon afterwards opened between the same parties, for the purchase of Bowensford by Bruce, who agreed to give 6200*l.* for it, and articles were executed in 1802, by which H. C. Bowen and the said trustees covenanted, in consideration of that sum, to convey the said estate to Bruce and his heirs, free from encumbrances; and he thereby covenanted to pay, in discharge of the debts of H. C. Bowen, or of the debts and encumbrances affecting the said estate, the said sum at the time of the conveyance, for the absolute purchase thereof. And he paid to Galway, at the execution of these articles, 2000*l.*, in part of the purchase money. He was then let into possession of the lands of Bowensford, and continued in possession of them, and of the lands of Kilbolane, to the time of his death.

* 263 * Various proceedings were taken in the cause of *Grove v. Bowen*, between the years 1802 and 1810, although Mrs. Grove, the plaintiff, had died in 1795, and there was no bill of revivor or supplement. By an order made the 21st of February, 1810, upon motion on behalf of G. E. Bruce, and upon reading the decree in the said cause, a consent and release by certain judgment creditors, and a certificate of the Remembrancer of the receipts of the several amounts of their judgments, &c., it was ordered, that the Remembrancer should execute a proper deed of conveyance of Kilbolane to Bruce, or to Richard Martin, as his trustee. Receipts for the judgment debts having been signed in the Chief Remembrancer's book, according to directions contained in that order, a deed of conveyance was perfected in that officer's name, by his deputy, on the 20th of June, 1810. By that deed, after reciting the testator's will, the decree in the said cause, the assignment to the new trustees in 1794, the purchase of Kilbolane by Martin, in trust for Bruce, for 19,025*l.*, and the confirmation of the sale, it was witnessed, that in consideration of the said sum, and other considerations therein mentioned, the said R. Martin, W. Galway, and H. C. Bowen granted, released, and confirmed to G. E. Bruce and his heirs, all the lands of Kilbolane.

There was no settlement of the purchase money of Bowensford, nor was there any conveyance of that estate ever made or demanded.

G. E. Bruce died in 1837, having by his will, dated in June, 1832, given all his estates in Ireland, — subject to an annuity of three hundred pounds, for five hundred years, which he had charged on Kilbolane in 1795, and which is now vested in his nephew, the respondent George Bruce, and others, — upon certain * trusts therein mentioned, and subject thereto, to * 264 the use of his nephews, the respondents, George Evans and John Evans, their heirs and assigns, as joint tenants.

Henry Cole Bowen, the eldest son of the testator, and first tenant for life of his estates, died in 1837, without having ever had issue. Robert Cole Bowen, fourth son of the testator, and second tenant for life of the devised estates, married, in 1806, a daughter of Mr. W. Galway, before mentioned, and died in 1827, leaving Henry Cole Bowen (the third), his eldest son, born in 1808, who was then first tenant in tail under the limitations in the will. He married, in 1828, a granddaughter of the said Mr. Galway, and died in 1841, leaving the appellant, his eldest son, born in 1830, and other children.

The guardians of the appellant having had their attention directed to the sales of the estates in question, caused inquiries to be made on the subject, and in consequence of the discoveries they made, chiefly from letters and documents in the possession of the Galway family, they filed a bill in the appellant's name, in the Court of Chancery in Ireland, in February, 1843, against the said George Bruce, George Evans, and John Evans, and others, claiming interests under the will of G. E. Bruce, for the purpose of setting aside the sales of Kilbolane and Bowensford, for fraud.

The bill, after stating the will and death of Henry C. Bowen, the testator, and other matters before mentioned, further stated that, in 1788, G. E. Bruce, then residing in Limerick, and having command of considerable sums of money, entered into a treaty with H. C. Bowen, the testator's eldest son, for the purchase of Kilbolane, and offered the sum of 19,025*l.*, to which offer H. * C. Bowen agreed, but the trustees named in the will * 265 refused to execute the power of sale therein given, or to act in the trusts, whereupon it was agreed between H. C. Bowen, G. E. Bruce, and W. Galway, then land agent of the former, that

a suit should be instituted on the equity side of the Court of Exchequer in Ireland, by some friend of H. C. Bowen, having a charge on the estates, in order to raise payment of the same, and have a general administration of the testator's real and personal estate, and to have new trustees appointed, and to get a decree for the sale of the estates, but that no receiver should be appointed against H. C. Bowen's possession ; that it was further agreed that Richard Martin, then law agent of H. C. Bowen, should be the attorney for him and for the plaintiff in the proposed suit, and also for the younger children of the testator, and should so manage the proceedings that W. Galway, and some other friend of H. C. Bowen, might be appointed trustees, instead of those named in the will, and that G. E. Bruce and Roger Sheehy might be declared purchasers of Kilbolane and Bowensford respectively, for the sums previously agreed upon ; that in pursuance of such arrangement, the suit of *Grove v. Bowen* was instituted, Mrs. Grove the plaintiff, being a near relative and friend of H. C. Bowen, and claiming, as executrix of James Grove, to be entitled to a judgment debt affecting the estates.

The bill then alleged several irregularities in the suit, as the absence of Robert Cole Bowen, a defendant, in the East Indies, without that fact being disclosed to the Court, the putting in of a joint answer by Charles Martin, brother of Richard, for him and * 266 other children of the testator, with * forged signatures, the purchasing up of encumbrances on the estate of Kilbolane by G. E. Bruce, to be set off against the purchase money, &c. The bill also stated the decree made in 1793, and that the Chief Remembrancer, in taking the accounts thereby referred to him, was attended by R. Martin only, and adopted a report prepared by him, to meet the views of H. C. Bowen and G. E. Bruce ; it next stated the decree on further directions, in July, 1794, and the manner in which the sale of the estates was conducted, there being in fact but one bidder, R. Martin, and that the arrangement by which the conveyance of Kilbolane was made to G. E. Bruce in 1810 was improperly obtained.

The bill prayed that the several proceedings in the said suit, and the decrees and subsequent orders, and the conveyance to G. E. Bruce of Kilbolane, in June, 1810, might be declared fraudulent and void as against the appellant ; and that he might be declared entitled to have the lands of Kilbolane and Bowensford

restored to him, upon payment of whatever might be justly due to those claiming under G. E. Bruce for principal and interest of the several encumbrances originally affecting the estates of the testator, and alleged to be vested in G. E. Bruce, or in a trustee for his use, and that accounts might be taken of these encumbrances, and of the rents and profits of the estates since the death of H. C. Bowen, the first tenant for life ; and also of the several sums of money received by G. E. Bruce and those claiming under him, by way of fines for leases granted by him or them of the said lands, which leases the appellant was, in consideration of such account, willing to confirm ; and that in case the rents and fines, and interest on the fines, should be found to exceed * the in- * 267 terest on the encumbrances, the amount of the latter should be deducted from the former, and the balance applied in reduction of the principal due on foot of the encumbrances since the death of the said H. C. Bowen ; and that the appellant might be at liberty to pay the balance into Court, to indemnify him against such of the defendants as should be proved to be purchasers for value, of any estate in the lands of Kilbolane and Bowsensford, without notice, &c.

The respondents, John and George Evans, and their respective wives, put in a joint answer, in which they insisted and relied on the absence of all fraud in the suit of *Grove v. Bowen*, and on the completion of G. E. Bruce's title to Kilbolane under the decree and orders therein, by the conveyance of 1810, under which he held that estate undisturbed down to his death in 1837, from which time they, as his devisees, held the same, without question of their right, until 1843.

The respondent, George Bruce, in his answer, set out a deed, made in December, 1795, on the marriage of his father and mother, by which G. E. Bruce, for valuable consideration, granted a rent charge of 300*l.* a-year, for 500 years, out of the lands of Kilbolane, which rent charge was settled on the issue of that marriage, and became vested in this respondent, as the only child. He therefore claimed to be entitled as a purchaser for valuable consideration, without notice of any defect in the title of G. E. Bruce, if any such existed, or of any claim or demand of the appellant, or any other person, or of the circumstances stated in the bill impeaching that title. He also set up the general defence, as to

his information and belief, that there was no fraud in the
 * 268 proceedings in the cause of *Grove v. * Bowen*, so far, at all events, as G. E. Bruce was concerned ; and he rested his title on the decree and orders therein made, and on the final conveyance of the estate to G. E. Bruce in 1810.

The other defendants to the bill having put in their answers, numerous witnesses were examined, and the cause was heard in May, 1844. The material parts of the evidence, and a full statement of all the circumstances relied on by the principal litigant parties, together with the elaborate judgment of the Lord Chancellor, are contained in the reports, 1 Jones & La Touche, 178, and 6 Irish Eq. Rep. 569.

His Lordship, in the course of that judgment (a full copy of which, as taken by the short-hand writer, is printed in the appendix to the respondents' cases) appears to have considered the following irregularities as admitted on the pleadings or proved : —

That (in the cause of *Grove v. Bowen*) the answer of the appellant's grandfather, R. C. Bowen, tenant for life of the lands, next in remainder after the death of H. C. Bowen, the first tenant for life, without issue male, was filed as if signed by him ; whereas he was out of the jurisdiction at the time, and the answer was not signed by him, nor any order obtained for liberty to file it without signature :

That no account was taken of the rents of the real estates due at the death of the testator, and which formed part of his personal estate ; nor of the rents received since his death by the tenant for life, nor of the application of them :

That interest at the rate of 6*l.* per cent. was reported and decreed upon encumbrances, which carried interest at the rate of 5*l.* per cent. only ; and that principal sums were reported and
 * 269 decreed to be paid out of the * produce of the sale, some of which had been paid off by the testator, and others were not his debts at all, or encumbrances upon the lands sold :

That the first tenant in tail before the Court (in the said cause), was a minor, and by consent it was decreed that the lands should be sold, in case of non-payment of the sums decreed in three months, instead of six months, the usual period ; and no day was given to the minor to show cause against the decree :

That the tenant for life had, prior to the filing of the bill in the said cause, contracted with the purchaser for the sale of the lands

to him, at a stipulated price, and the bill was filed to enable the parties to carry that contract into execution :

That there was no real competition at the sales under the decree, but they were so arranged that the lands were sold to the purchaser at the stipulated price :

That the purchaser having, pursuant to the contract with the tenant for life, bought up encumbrances affecting the estate, a report was, with his consent, taken, finding that a large arrear of interest was due to him on the encumbrances, the whole of which was decreed to be, and was, paid out of the produce of the sale, although part of it had been previously paid by the tenant for life :

That interest, reported on the encumbrances vested in the purchaser, was suffered by him, at the request of the tenant for life, to run in arrear, the tenant for life, in consideration of such indulgence, paying interest upon interest ; and that no provision was made by the decree to make the estate of the tenant for life recoup the inheritance for the interest paid out of the produce of the sale, which ought properly to have been paid by him :

That a tenant in tail, nearer than any before the * Court * 270 in the said cause, who came into *esse* after the sale and before the conveyance, was not made a party to the suit :

That the plaintiff (Mrs. Grove) having died before the conveyance, the purchaser bought up her demand and the benefit of the decree, but did not revive the suit, and references and reports, bearing relation to the sale of the estates, were, at his instance, made in the abated cause.

His Lordship, notwithstanding those irregularities, was of opinion that there was no fraud, and by his decree (dated the 22d of May, 1844), declared that the appellant was not entitled to impeach the sale of Kilbolane ;

And it was ordered and decreed, that it be referred to the Master, to take an account of the principal sums and costs paid by G. E. Bruce, for the debts and encumbrances affecting the estates of H. C. Bowen, the testator, including principal sums paid to his younger children : And it was ordered that the Master should ascertain what portion of the sum of 19,025*l.*, mentioned in the order of February, and in the deed of conveyance of June, 1810, consisted of costs properly chargeable against the inheritance, and of principal monies and interest due at the death of the testator, and what portion thereof consisted of interest which accrued after his death, or other monies which ought properly to have been paid by H. C. Bowen, the tenant for life ; and also that the Master should supply a

sufficient sum to make good such portion of the 19,025*l.* as consisted of costs not properly chargeable against the inheritance, and interest which accrued since the testator's death, and other sums, if any, which were properly payable by the tenant for life out of the other principal monies and interest thereon due at the testator's death, and costs so paid or advanced as aforesaid by G. E. Bruce, not included in the said order and deed of conveyance, so as to complete the said purchase money of Kilbolane, out of principal monies and interest thereon, and costs due at the time of the death of the testator, and paid by G. E. Bruce, * 271 and properly chargeable against * the estate of the testator: And it was further ordered that the defendant, George Bruce, as personal representative of G. E. Bruce, do release the property of the said testator from the payment of such part of the encumbrances as the Master should so apply to the payment of the said balance of the purchase money of Kilbolane.

And with respect to the articles for the sale of Bowensford, it was ordered and decreed that the same be set aside: And it was further ordered that the Master should ascertain what sum remained due to G. E. Bruce, on foot of the encumbrances vested in him for principal money and costs, and interest which accrued in the lifetime of the testator, over and above the sum necessary for payment of the balance of the purchase money of the said lands of Kilbolane; and the Court declared that the personal representative of G. E. Bruce should, on the 28th of January, 1837 (the day of the death of H. C. Bowen, the tenant for life), be considered as a creditor for that amount; and it was further ordered, that the Master do compute interest on so much of the said sum as consisted of principal monies, from that day, at the rate of 6*l.* per cent.; and that he take an account from the said day of the rents and profits of the lands of Bowensford, which accrued due and were received after the death of the tenant for life by G. E. Bruce, or the defendants G. Evans and J. Evans respectively, since his decease; and that he do apply the said rents and profits, first in discharge of the interest, calculating interest at 6*l.* per cent., and then in reduction of the principal of the balance of the monies so advanced by G. E. Bruce, remaining after the application of such portion thereof to the Kilbolane purchase money as before directed, making annual rests; and if it should appear after such application thereof to the Kilbolane purchase money, that any sum remained due to those claiming under G. E. Bruce, it was further ordered, that the appellant do pay the same to the defendant G. Bruce, as executor of G. E. Bruce, and if the said rents and profits so applied should be found to exceed all monies so due for principal and interest thereon and costs, the Court declared that the appellant was entitled to so much of the rents and profits of Bowensford as should remain after payment of * 272 such principal * and interest and costs. And it was further ordered, that such last-mentioned rents and profits be paid to the appellant by the defendants George and John Evans; and, when the balance upon taking such account was ascertained, that the appellant be restored to the possession of Bowensford, he first paying, in case the balance was against him, the sum found to be due to George Bruce, as personal representative of G. E. Bruce (and for taking the accounts, the parties were to produce before the Master all deeds, &c.). And it was further ordered, that an injunction should issue, to put the appellant in possession of Bowensford, and that the articles of June, 1802, be thereupon delivered up to him; and that the bill be dismissed, with costs, as against G. Bruce (owner

of the annuity charged upon Kilbolane): And with respect to costs, it was ordered that the appellant should pay the costs of the defendants, except George and John Evans, who were to repay the said costs to the appellant, and that he and they should abide their own costs respectively.

The appellant appealed, generally, against that decree, except so far as the Master was thereby directed to take an account of the principal sums and costs paid by G. E. Bruce for debts and encumbrances affecting the estates of H. C. Bowen, the testator, including the principal sums paid to the younger children; and except also so far as it was thereby decreed that the articles for the sale of Bowensford should be set aside, and given up to the appellant, and that an injunction should issue to put him in possession thereof; and that he should have the said costs from the respondents George and John Evans.

Mr. Kindersley and *Sir Fitzroy Kelly* for the appellants:—

The long lapse of time from the date of the transactions impeached in this suit is far less disadvantageous to the respondents than to the appellant. His father * and grand- * 273 father might have impeached the transactions in the lifetime of the tenant for life, who lived until 1837, but they were not bound to do so, nor had they the necessary evidence. That remained with the tenant for life, and the agent W. Galway, both of whom resided in England, or elsewhere out of Ireland, from 1816 to the time of their death. The evidence which has been found—consisting chiefly of letters found in the repositories of their families in Ireland, and of the decrees, orders, and proceedings in the cause of *Grove v. Bowen*—clearly shows that the sale of Kilbolane was made by a private agreement between the tenant for life and G. E. Bruce, which was not binding on the remainderman; and that the suit of *Grove v. Bowen* was instituted and carried on for the purpose of giving effect to that private agreement, under the apparent sanction of the Court, but really without its direction, and independently of its control. The suit, throughout its progress, was made subservient to a private course of dealing, concurrently carried on between the tenant for life and the purchaser, and not one step was taken in it further than was necessary to effect and carry out their object. The apparent sale of Kilbolane, under the decree in that cause, was preceded by an agreement for an improper application of the purchase

money; to effect which, large sums were improperly charged, reported and decreed, and impositions were practised upon the Court, and on the owners of the inheritance. All the sales in Court, and the accounts also, so far as they professed to be taken by the officer of the Court, were fictitious, and were conducted without regard to the rules of the Court, or to the sums actually due, or to the directions of the decree; while the payment of the debts, the professed object of the suit, and the application * 274 of the monies advanced for the purchase money, were not at all submitted to the control or direction of the Court. By the fictitious dealings in Court, and the real transactions out of it, large sums of money were designedly and improperly thrown upon the inheritance. The purchaser was cognizant of, and a participator in, these fraudulent transactions; both he and the tenant for life, acting in concert, obtained pecuniary benefits for themselves, at the expense of the remainder-men; and by means of these several transactions, the purchaser evaded the payment of a considerable portion of his purchase money, and ultimately procured a conveyance, under the apparent sanction of the Court, by taking credit for large sums as due to him and his trustee for interest on encumbrances, which interest had been long previously discharged. No length of time or of possession nor decree of Court can protect a title obtained under such circumstances; *Giffard v. Hort*,¹ *Colclough v. Bolger*,² *Gore v. Stacpoole*,³ *Thornhill v. Glover*,⁴ *Earl of Bandon v. Becher*,⁵ *Mullins v. Townsend*.⁶

This suit also, besides not being a *bond fide* proceeding, was improperly conducted from the beginning to the end, as in not apprising the Court of the absence of Robert Cole Bowen, the then next tenant for life of the estates, out of the jurisdiction; in not having him and other defendants (one of whom, Catherine C. Bowen, was one of the owners of the first estate of inheritance), properly brought before the Court, and *bond fide* represented * 275 in the cause by a separate attorney; * and, in filing and signing without authority, the answers for these and other adult younger children of the testator. The suit was improper and fraudulent in respect of the charges filed for G. E. Bruce, and

¹ 1 Schoales & Lefroy, 386.

² 4 Dow, 54.

³ 1 Dow, 18.

⁴ 3 Drury & Warren, 195.

⁵ 3 Clark & Finnelly, 479.

⁶ 2 Dow & Clark, 430.

his trustee, and other creditors, and in the report and decree consequent thereon; in the omission to report the rents of the estates due at the death of the testator, and the rents received by the tenant for life, as directed by the decree; in the biddings and sales in the Remembrancer's Office; in not bringing before the Court a tenant in tail, who was born in 1808; and in the several proceedings taken in 1809 and 1810, after the cause had abated; *Kennedy v. Daly*,¹ *Hamilton v. Ball*,² *Lightburne v. Swift*.³

The final decree was erroneous, in point of practice, in directing a sale in three months by consent of parties, some of whom were minors representing the inheritance, six months being the usual time; in not giving the minors a day to show cause; and in decreeing several sums to various persons not entitled thereto, for principal, interest, and costs. Although defects of this nature, or even errors, may not affect a *bond fide* purchaser, who is no party to them, such a rule ought not to be extended to the case of a purchaser such as G. E. Bruce, who had actual notice of them both by himself and his agents; who came in under the decree and filed a charge, and thereby made himself a party in the suit; who was first a party to the proceedings by which the estate was improperly burthened, and afterwards adopted them for his own benefit; and who, by taking an assignment of the interest of the * plaintiff in the abated cause, and of the decree, with * 276 powers of attorney to carry the decree into execution, became entitled to carry on, and did carry on for his own benefit, the several subsequent proceedings; obtaining the consent, and order upon it, the certificate of the encumbrances, and, by himself and his trustee, signing receipts for sums not due, as the consideration for his deed of conveyance; *Colclough v. Sterum*,⁴ *Talbott v. Minnett*.⁵

An agreement *a priori* for compound interest, as was made between H. C. Bowen and G. E. Bruce, is usurious in its nature and tendency, and contrary to public policy, and void; *Lord Ossulston v. Lord Yarmouth*,⁶ *Ex parte Bevan*,⁷ *Eaton v. Bell*.⁸ Such an agreement could not have been enforced directly between the parties to it; and G. E. Bruce having made his apparent pur-

¹ 1 Schoales & Lefroy, 355.

² 2 Irish Eq. Rep. 191.

³ 2 Ball & Beatty, 207.

⁴ 3 Bligh, 181.

⁵ 6 Irish Eq. Rep. 83.

⁶ 2 Salkeld, 449.

⁷ 9 Ves. 223.

⁸ 5 Barnewall & Alderson, 34.

chase, under the decree of the Court, which was made the means of obtaining such usurious interest, is not entitled to have his purchase upheld in a Court of Equity, as if he had been a *bond fide* purchaser without notice. He, having by means of his apparent purchase under the decree and by his dealing with the tenant for life, obtained compound interest on his advances, which he could not otherwise have enforced, derived a benefit from his concurrence in the fraudulent report of arrears of interest as due on the encumbrances vested in him and his trustees. But even if he had not thereby obtained any benefit for himself, yet, inasmuch as he deliberately and knowingly concurred in a fraud connected

* 277 with his purchase, and * thereby enabled the tenant for life to gain great advantages, to the prejudice of the inheritance, he is as much disabled from maintaining his purchase in a Court of Equity, as if he had himself personally obtained the benefit which he enabled the tenant for life to gain.

The lapse of time in this case is no bar to the relief claimed by the appellant ; because allowing to mere lapse of time the effect of throwing the burthen, of proof more completely on the plaintiff, and of giving the defendant the benefit of the most favourable construction of doubtful evidence ; yet that does not authorise the Court to put a construction upon the facts, when proved, different from that which would, in a recent transaction be considered the true construction, or to assume facts in the absence of proof, in order to uphold the sale. To give such an operation to mere length of time would amount to a denial of justice in many cases, especially where there is a continuing life estate, the pendency of which must necessarily exclude the remainder-man (whose estate may never take effect, as it may be divested by the birth of a prior tenant in tail), from access to family papers, and thereby shut him out from the means of discovering the acts complained of, until his estate falls into possession. The true question is, whether by clear evidence, such a state of facts is proved as would be sufficient to set aside the sale in a recent transaction ; for although clearer proof is required in a stale transaction, yet, if the facts are proved, the law is not different in such a transaction and in one of later date. Moreover, where the Statutes of Limitations do not apply, (as in cases of fraud,) time should not be permitted to operate against a party before he has discovered the circumstances on which his right depends.

* The note of the case of *Townsend v. Warren*, cited from * 278 Mr. Beatty's MSS., and relied on by the Lord Chancellor as an authority for refusing relief as to the purchase of Kilbolane, has been since discovered to contain an important misstatement of the facts of that case ;¹ and it cannot be relied on as an authority, overruling many decisions of this House, by which sales impeached on grounds similar to those proved in this case have been uniformly set aside. The Lord Chancellor himself expressly disapproved of the case, but thought he was bound by its authority.

If the appellant should not be held entitled to set aside the sale of Kilbolane, yet the accounts directed by this decree² are not such as he would, even in that case, be entitled to require. For, by the contract and dealing of the parties, it is clear that G. E. Bruce was bound, from the time he entered into possession in 1795, to pay interest on the unpaid balance of his purchase money, which interest should have been applied for the relief of the inheritance ; yet, by the decree appealed from, establishing this contract as binding on the appellant, and professing to give him complete relief, G. E. Bruce and his representatives are held entitled to the enjoyment from 1795 to the present time, of an estate sold for payment of debts with a large balance of purchase money unpaid ; and it is thereby decreed that this contract shall now be completed by payment of the principal ; but the inheritor is not decreed entitled to any interest thereon. It is clear, that if the trustees named in the will had sold the estate out of Court, any interest on the purchase money should have been by them applied for payment * of debts ; and on the purchaser taking posses- * 279 sion, the estate of the tenant for life would have ceased, and no part of the interest of the purchase money could have been paid to him without a breach of trust. If the purchaser had paid his purchase money into Court with interest, the Court would have applied the interest as well as the principal in discharge of debts affecting the inheritance. This interest, therefore, ought to have been paid, and, if the sale be not set aside, ought now to be paid and applied for the benefit of the appellant as the owner of the inheritance.

Mr. Bethell (with whom were *Mr. J. Russell* and *Mr. G. M. Giffard*) for the respondents John and George Evans, and *Mr. G.*

¹ 1 Jones & La Touche, 221 ; 6 Irish Eq. Rep. 620.

² *Supra*, p. 270.

Turner, for the respondent George Bruce, denied that there was any evidence of fraud in the transactions, or that any fraud was practised or intended. There were some irregularities in the proceedings in the suit of *Grove v. Bowen*, but such irregularities or errors of the Court were not sufficient to impeach a *bonâ fide* purchase, which was never disputed until after all the persons, who had any personal knowledge of the circumstances connected with it, were dead. The sale was acquiesced in by all parties, from 1794, particularly by Robert C. Bowen, the grandfather, and Henry C. Bowen (the third), the father, of the appellant, both of whom — one married to the daughter of Mr. Galway, the other to his granddaughter — had the means of knowing, and must have known, the circumstances connected with the sale, but with such knowledge acquiesced in all that was done. There was no proof of fraud, or that the estate was sold at an under value; on the contrary, there was clearer proof than could have been

* 280 expected, after a lapse of fifty years, of * the *bona fides* of the whole transaction, and every reason to infer, that a fair price was given. The only ground on which the appellant's case rested were mere irregularities, unattended with any injury to the inheritance. They distinguished the cases before cited from this, and referred to *Aston v. Aston*,¹ *Lloyd v. Johnes*,² *Bennett v. Hamill*,³ *Loftus v. Swift*,⁴ *Curtis v. Price*,⁵ *Shine v. Gough*,⁶ and relied particularly on the case of *Townsend v. Warren*.⁷

The case stood over for consideration since 1846.

1848. September 21.

THE LORD CHANCELLOR. — The bill in this case prayed that the purchases of Kilbolane and Bowensford might be declared fraudulent and void, and those estates restored to the appellant, and all the other relief prayed was consequential upon such a declaration being made; but there was no alternative prayer for any relief, upon the supposition of such purchases not being set aside; there was nothing prayed to correct any alleged error or improper set-

¹ 1 Ves. Sen. 267.

² 9 Ves. 37.

³ 2 Schoales & Lefroy, 566.

⁴ 1 Jones & La Touche, 220, 221; and 6 Irish Eq. Rep. 620.

⁵ 2 Schoales & Lefroy, 642.

⁶ 12 Ves. 89.

⁷ 1 Ball & Beatty, 436.

ting of the purchase money or interest, or of interest upon the debts or charges paid off by the purchaser.

By the decree, the purchase of Kilbolane is established, but directions are given for correcting some such supposed errors or improper modes of settlement, and from this part of the decree no appeal has been presented. It is therefore unnecessary to consider how * far such directions are consistent with the * 281 state of the pleadings and the case made by the bill, particularly in the absence of any personal representative of Henry Cole Bowen, the tenant for life, by whom the sale was effected, and whose personal estate must be principally interested in the result of the accounts directed to be taken.

The decree also set aside the contract for the purchase of Bowensford, but against this part of the decree no appeal has been presented.

I call the attention of the House to these circumstances, that it may be distinctly understood that, in affirming the decree upon this appeal, the House expresses no opinion as to those parts of the decree, but only as to that part of it which is the subject of appeal, namely, the declaration that the plaintiff is not entitled to impeach the sale of the lands of Kilbolane, and the refusal therefore of the relief prayed, with reference to the sale; and upon that point, I am very clearly of opinion that the decree is right.

It is true, that if a case of fraud be established, Equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivances by which it may have been attempted to protect them. It is immaterial, therefore, whether such machinery and contrivances consisted of a decree of a Court of Equity, and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud. But in proportion as this jurisdiction is powerful and operative, so ought the care and caution of the Court to be anxiously exercised as to the grounds upon which it proceeds, lest in the zeal to do equity, the reverse be effected.

* So, when much time has elapsed since the transactions * 282 complained of, there having been parties who were competent to have complained, the Court will not, upon doubtful or ambiguous evidence, assume a case of fraud, although upon fraud clearly established, no lapse of time will protect the parties to it,

or those who claim through them, against the jurisdiction of Equity depriving them of the effects of their plunder.

In the present case, the bill, filed in 1843, complains of a contract of purchase made in 1788, and completed in 1795 ; for the confirmation of the Master's report was the completion of the purchaser's title, although the conveyances were delayed until 1810. The suit in which the purchase was made was a suit properly constituted, and there were among the parties to it, the tenants in tail of the estates at the time *in esse*. This sale the bill sought to set aside as fraudulent. But in what is the fraud alleged to have consisted ? The bill does not state, and certainly it is not proved, that there was any corrupt bargain between Henry Cole Bowen, the tenant for life with remainder to his sons in tail, and the purchaser. The tenant for life might have been, and indeed is proved to have been, desirous of throwing upon the inheritance some of the interest upon the encumbrances which he ought himself to have borne, but there is no allegation or proof of his having agreed, for any corrupt consideration between them, that the purchaser should have the estate for less than its real value ; for although the bill alleges that the sum agreed upon was less than the real value, that is attributed not to any corrupt bargain, but to the valuation having been made without sufficient attention having been given to the probable increase of value from the dropping of lives. Of this probable increase of value, however, or of the value in 1788 or 1795, having been greater than the sum agreed upon, there is no proof, but there is, on the contrary, much reason to believe that it was the fair value ; for although the public were enabled, by advertisement, at both those periods, to make offers and biddings for the property, no higher sum appears to have been offered or bid. It is sufficient, however, that there is no proof of the sum agreed for being less than the true value, or that there was any corrupt or unfair agreement relative to the price.

In 1788, the encumbered state of the property made a sale indispensable ; the trustees, in whom the power of sale was vested, declined acting, and the contract was made by the tenant for life with the purchaser. This was much in the usual course of such matters, and certainly no suspicion of fraud can arise from such a transaction. It was found impossible to carry this contract into

effect, from the trustees not being willing to act, and from no other reason. It was therefore necessary to apply to a Court of Equity, and a suit properly constituted for that purpose was commenced in 1789, and new trustees were appointed.

With respect to the contract of purchase, two courses were open, according to the practice in Equity, the one to obtain a reference to the Master to inquire whether the contract ought to be carried into effect, and the other to procure an order for a sale, without reference to the Master. If the parties had intended a fraud, the former course would probably have been adopted, as excluding the competition which the other course was certain to invite; but the latter course was adopted, and a sale was advertised.

Whether there were any real bidders at the sale, except * Mr. Bruce, who had before agreed for the purchase, does * 284 not distinctly appear, although there probably were not. But if that be so, it leaves untouched, upon the question of value and fairness, the fact that, notwithstanding the various interests connected with the property as encumbrancers and otherwise and the advertisements to the public, no one was found to offer more than Mr. Bruce had agreed to give. Mr. Martin, who had bid for Mr. Bruce, was declared to be the purchaser, and by an order of the 10th of February, 1795, that purchase was absolutely confirmed, and the question is, whether in the year 1845, when the decree appealed from was made, those who claim through Mr. Bruce were to be deprived of the purchase so made. If this purchase were not impeachable in 1795, it cannot be so from any irregularities in the subsequent conduct of the cause, or from any error or improper mode of dealing with the interest of the purchase money, or of the interest of the encumbrances, which had been bought up by Mr. Bruce, and which exceeded the purchase money he had agreed to pay. But of such subsequent transactions, the whole case made by the appellant consists,—facts which might be important as leading to a conclusion upon the question of fraud in the original contract, if that had been left in doubt, but totally ineffectual to shake the validity of a contract otherwise impeachable.

Such being the opinion I have formed, upon a careful consideration of the evidence in this case, it does not appear to me to be

material, or indeed relevant, to make any observations upon the several cases which were referred to on either side at the bar.

They have been fully commented upon by Sir Edward Sugden, *in his judgment; and I quite agree with him, that the case of *Townsend v. Warren*, affirmed in this House, not only supports the decree in this case, but goes far beyond it.

I should be sorry indeed, if, in proposing to your Lordships to affirm this decree, it should be supposed that I am, in any respect, weakening the power and jurisdiction of Courts of Equity in cases of fraud. I most certainly have no such intention, and no such inference ought to be drawn, because I form my opinion on the absence of sufficient evidence of any such fraud having been practised or attempted. I think it is not only not proved, but negatived, and I cannot but think that the decree is quite as favourable to the appellant as it ought to have been. I therefore move that the decree be affirmed, with costs.

The decree was accordingly affirmed, with costs.

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* MATHESON v. ROSS.

1849. March 19, 20, 27.

KENNETH MATHESON and others, *Appellants*.
ALEXANDER ROSS, *Respondent*.

Evidence. Stamp.

Where a paper purports to be a receipt, and, as such, requires a stamp, but also purports to be an agreed statement of accounts, which does not require a stamp, it may be given in evidence to show the agreed state of accounts only, though it has not been previously stamped.

Its admissibility under such circumstances is restricted to this extent: so far as it relates simply to proving the statement of account, and is not produced for the purpose of proving the receipt of money. It cannot be used for the purpose of proving the receipt of money in any way.

If a document which is unstamped, but requires a stamp, is offered in evidence, and if stamped, would be evidence to establish any point litigated between the parties, it cannot be received. If it would be of no benefit when stamped, it may, though unstamped, be received in evidence.

In an action for work and labour, there was tendered in evidence a paper containing a statement of accounts, which declared a balance of 68*l.* 9*s.* 4*d.*, and

at the end was an acknowledgment of the payment of that sum. In an action for work and labour this paper was offered in evidence by the defendant, not for the purpose of proving that the sum of 68*l.* 9*s.* 4*d.* had been paid, for that was not in contest between the parties, but in order to show what was the admitted state of accounts at a particular time : —

Held (reversing an interlocutor of the Court of Session), that it was admissible for that purpose.

THIS was an appeal against an interlocutor of the Court of Session. Ross instituted a suit for the purpose of recovering two sums of 143*l.* and 662*l.*, which he claimed as due to him for executing certain * works on the Edinburgh and Glasgow * 287 Railway, for the execution of which Matheson and Co. had undertaken a contract with the Railway Company. The following were the issues framed for the decision of the jury : —

“First, whether during the years 1841 and 1842, the pursuer, upon the employment of the defenders, executed certain work, as set forth in, &c. for the defenders, upon the Edinburgh and Glasgow Railway ; and whether the defenders are now due and indebted to the pursuer in the sum of 143*l.* 3*s.* 11*d.* sterling, or any part thereof, as the balance of the price or value of the said work, with interest from the 31st March, 1842.

“Second, whether during the year 1841, the pursuer, on the employment of the defenders, executed certain extra work on the railway to the value of 662*l.* 16*s.* 4*d.*, as set forth in, &c. ; and whether the defenders are now due and indebted to the pursuer in the said sum of 662*l.* 16*s.* 4*d.* as the price or value of such extra work, with interest from the 31st December, 1841.”

The cause came on for trial before the Lord Justice Clerk, when both parties went into evidence. On the part of the defenders (the present appellants) a witness was called, who said : “I met Mr. Ross in January, 1842, to settle an account between him and my father and brother. Two papers now shown to me, marked Nos. 19 and 20, are in my handwriting. Mr. Ross’s signature is on No. 20. These two papers originally formed a single half-sheet. I separated them, probably to exhibit to the Railway Company the paper No. 20 with Mr. Ross’s signature, as a voucher for the sum of 68*l.* 9*s.* 4*d.*”

* The document marked No. 19, being the first part * of * 288 the paper in question, was a long debtor and creditor account, with items on both sides, in the following form : —

Dr.	Alex. Ross.	Cr.
	£ s. d.	
1841.		1841.
Aug. 7. Cash	240 0 0	Aug. 7. Pay-bill
(Then followed many other items of the same sort, and ending thus:—)		305 14 9
Dec. 21. Ditto	20 0 0	(Then followed other items of the same sort, the account ending thus:—)
1842.		
Jan. 13. Ditto	25 0 0	
	1181 12 0	Dec. 11. Ditto
Balance	68 9 4	45 3 8
	1250 1 4	1250 1 4
Jan. 17. To Cash	68 9 4	Jan. 13. By Balance
		68 9 4

The document No. 20, which had originally formed part of the same half-sheet of paper, contained the following words and figures:—

“DULLATUR, 17th January, 1842.

“I acknowledge having received from K. Matheson 68*l.* 9*s.* 4*d.* sterling, being balance amount of pay-bills paid from 7th August to 11th December, both inclusive.

“ALEX. ROSS.”

When this paper was tendered as part of the defendant's evidence, it was objected to by the plaintiff's counsel as inadmissible for want of a receipt stamp. The defendant's counsel insisted on its admissibility, not as containing an acknowledgment of the payment of this sum of 68*l.* 9*s.* 4*d.*, for the payment of that particular sum was not included in the demand made, being admitted on the plaintiff's own statement of his case, but as an acknowledgment of the correctness of the entries on the paper No. 19. The Lord

Justice Clerk received the paper, subject to the objection.

*289 *The case was afterwards brought before the Judges of the Second Division of the Court of Session, who, having consulted the other Judges, decided by a majority that the paper ought not to have been received in evidence, and therefore ordered judgment to be entered for the pursuers. This was an appeal against that interlocutor.

Sir F. Kelly and *Mr. Anderson* for the appellants:—

The Judges in the Court below were in error in supposing that the rule of law which makes unstamped instruments inadmissible

in evidence, admitted of no qualification. Here was a paper containing two things perfectly divisible from each other, the one a statement of account, the other an acknowledgment of the payment of money. The first clearly did not require a stamp, the other only required a stamp if proposed to be used as evidence of the receipt of money; yet the Judges of the Court below thought that the latter portion of the paper made the whole inadmissible for any purpose whatever.

The principle relied on by the Court is applicable only to cases where the unstamped part is offered in evidence to prove a payment of money. Here it was offered for a totally distinct purpose. There was no question raised at the trial as to the payment of this sum of 68*l*. That payment was admitted on the record as well as proved in a part of the plaintiff's own evidence. All therefore that the defendant had to show was that that balance was the balance really due at a particular time. For such a purpose this paper, which showed an agreed state of the accounts at that period of time, was clearly evidence.

In the first place, the doctrine of the law is, in Scotland * as in England, that the Stamp Acts must be strictly construed. *Pirie's Representatives v. Smith*,¹ in the Court of Session, and *Wellard v. Moss*,² *Clark v. Hougham*,³ *Brookes v. Davies*,⁴ *Grey v. Smith*,⁵ *Horne v. Redfearn*,⁶ and *Tebbutt v. Ambler*,⁷ in the Courts here. These English cases likewise furnish instances in which an unstamped paper has been admitted in evidence for a purpose different from that in respect of which the particular stamp was required, although, if offered for the purpose in respect of which such stamp was required, it would not have been admissible. In *Grey v. Smith* there was a paper duly stamped as a receipt, but not duly stamped as an agreement, and it was held that if the paper was sought to be put in evidence to prove the agreement, it was not admissible, but that it was admissible to prove the receipt. In *Horne v. Redfearn* the exact converse of this took place. The cases of *Perry v. Bouchier*⁸ and *Millen v. Dent*⁹ are to the same effect. In the second of these cases all the preceding authorities

¹ 11 Shaw & Dunlop, 473.

² 1 Bingham, 134.

³ 3 Dowling & Ryland, 322.

⁴ 2 Carrington & Payne, 186.

⁵ 16 Law Journal N. S. Q. B. 374; 10 Q. B. 846.

⁶ 1 Campb. 387.

⁷ 4 Bingham N. C. 433.

⁸ 9 Carrington & Payne, 60.

⁹ 4 Campb. 80.

were considered, and there it was held that a bill of parcels, delivered by the plaintiff, having at the foot of it a receipt written at the same time with the bill, is nevertheless admissible without a receipt stamp for the purpose of proving that the goods mentioned were sold to a third person and not to the defendant. That case is further important as deciding expressly that, “where two separate instruments, each complete in itself, are written on the
 * 291 same * paper, one may be received in evidence without the other,” although for the purposes of this case it is not necessary to insist on applying that doctrine here. In *Finney v. Tootel*,¹ the defendant in an action for money had and received, put in evidence a paper which was in fact an unstamped receipt, and had been rejected on that account, and on the back of which the plaintiff had written, “Balanced up to this day, as per cash book, 19th December, 1845.” The Court of Common Pleas held that this memorandum was properly admitted, notwithstanding the fact of its being like the receipt, unstamped. In *Goodyear v. Simpson*,² the Court, in like manner, admitted an unstamped statement of accounts between several coach proprietors, though, in the course of it, there were several receipts for money payments introduced. The result of these cases is, that where the paper is, as it was in this case, offered in evidence to prove something collateral to the issue of payment or no payment, it is receivable. The Court below overlooked this distinction, and improperly rejected the evidence. The judgment of that Court must therefore be reversed.

Mr. Stuart Wortley and *Mr. McNeill* for the respondent:—

The distinction contended for on the other side is not applicable to the present case. This paper can only be contended to be admissible on the ground that it is offered in evidence for a purpose entirely collateral to that of proof of payment of a sum of money.

But the circumstances of the case do not warrant that argument, nor do the cases referred to support such a * doctrine
 * 292 to the extent to which it is now sought to be applied. What is a collateral purpose within the meaning of these and other cases? It is a purpose purely collateral to, or in other words, distinct from, the issue in the cause. That was not so here; for the

¹ 17 Law Journal N. S. C. P. 158; 12 Jurist, 291.

² 15 Meeson & Welsby, 16; 15 Law Journal N. S. Exch. 191.

issue here was, indebted or not indebted. The proof of a balance at a particular time was not collateral to that issue. In the cases referred to, the purpose for which the paper was offered in evidence was in every instance collateral, or had a stamp on it, which, though of an improper sort, was of sufficient value. In *Grey v. Smith*¹ the question in issue was, trespass or no trespass. In *Horne v. Redfearn*² and in *Tebbutt v. Ambler*,³ the paper was stamped as an agreement, and was put in evidence as such. *Brookes v. Davies*⁴ is not reported with sufficient fulness to be relied on, and in *Wellard v. Moss*⁵ no distinct issue of payment was raised. There is a reference in that case to *Jacob v. Lindsay*⁶ as "an authority for admitting the unstamped paper in evidence," which is erroneous, and in *Wellard v. Moss* itself the question was one merely of the correctness of the statement of an account. On the other hand, the authorities which establish that, where the essence of the issue cannot be proved but by the production of a written document, showing a payment of money, that document must be stamped, are numerous. The cases of *Rippiner v. Wright*,⁷ *The King v. The Inhabitants of Castle Morton*,⁸ *Hawkins v. Warre*,⁹ *The King v. Hall*,¹⁰ and *Jardine v. Payne*,¹¹ all establish this doctrine. The case of *The King v. Hall* is a very strong authority; for there the Court refused to receive in evidence an unstamped acknowledgment of the payment of money, though it was tendered, not to relieve the man who had paid the money from his civil liability, but to fix on the person receiving the money and writing the acknowledgment, the guilt of having embezzled his master's property. In *Jardine v. Payne* the Court refused to look at an insufficiently stamped bill of exchange to ascertain the fact of a particular indorsement being upon it. Lord Tenterden, in delivering the judgment of the Court in that case, said,¹² "We are of opinion that an unstamped bill, or one improperly stamped, cannot be read to the jury as evidence of the contract, or any part of it, in respect of which the plaintiff sues. . . . The proof of the indorsement to the plaintiff, without that of the contents of the bill, would be insufficient, as the identity of

¹ 1 Campb. 387.

² 4 Bingham N. C. 433.

³ 9 Carrington & Payne, 60.

⁴ 2 Carrington & Payne, 186.

⁵ 1 Bingham, 134.

⁶ 1 East, 460.

⁷ 2 Barnewall & Alderson, 478.

⁸ 3 Barnewall & Alderson, 588.

⁹ 3 Barnewall & Cresswell 690.

¹⁰ 3 Starkie N. P. C. 67.

¹¹ 1 Barnewall & Adolphus, 663.

¹² 1 Barnewall & Adolphus, at p. 670.

the bill, without that referred to by the defendant's letter, could not otherwise be shown. We think, therefore, that evidence of the contents of the bill was a necessary part of the defendant's title, and could not be given in evidence for want of a proper stamp." And his Lordship afterwards added, that "that decision must be considered as overruling the case of *Bishop v. Chambre*,¹ which had been used as an authority to show that an unstamped bill might be referred to, to show the amount of a debt * 294 where there had been a promise to pay." * The same principle had previously been acted on in *Wright v. Shawcross*.²

The paper here was to operate as an acquittance of a debt, by showing that at a particular time the account stood in a particular manner, and a certain balance forming part of the account had been paid, and it therefore comes expressly within the spirit of the statute. It does so, even on the supposition that the payment of the 68*l.* was established by the plaintiff's own evidence; for the proof that the sum of 68*l.* formed, just before the date of a particular payment, the balance due, made the proof of that payment applicable to the particular sum, and operated directly on the issue in the cause. That issue was indebted or not indebted; and if the defendants could by the paper show that at a particular time a certain sum only was due, and could by other evidence prove the payment of that or any other sum, the paper was a piece of evidence directly affecting the issue, and therefore coming within the words of the statute,—"receipt or discharge given for or upon the payment of money." The case of *Birt v. Leigh*,³ shows how these words are to be construed, and the circumstances of that case very much resemble those of the present. There the plaintiff had done plasterer's work, and money was paid weekly on account, and receipts were given from time to time for the money so paid. When the work was completed, and the balance owing was paid, the following receipt was given: "1843, July 8. — Received of Mr. G. L. the sum of 2*l.* 2*s.*, being the balance of account up to this day for houses in Wellington Road." The Court * 295 held that this paper was an acknowledgment * of a receipt of money in satisfaction of a debt, and so required a stamp. There, as in this case, the account itself was made up of a number

¹ Danson & Lloyd, 83.³ 14 Meeson & Welsby, 177.² 2 Barnewall & Alderson, 501 note.

of pay-bills, and the payment of the balance was declared by a "receipt or discharge." The only difference between the two cases is the amount for which the receipt was given ; the principle in both is the same, and as the paper here was sought to be used for a purpose which necessarily had a strong, if not a direct bearing on the issue between the parties, it was properly rejected, and the judgment of the Court below must be confirmed.

Sir F. Kelly, in reply. — It is not denied, on the other side, that if the paper is tendered in evidence for a purpose distinctly collateral to that of payment, it is admissible in evidence. But it is said that the purpose here is not collateral. Let this case be put on that ground. Suppose the two pieces of paper to form but one, and to contain, as this paper does, items of charge and payment in the ordinary form of an account, resulting in a balance of 68*l.* 9*s.* 4*d.*, which balance is, by a memorandum signed by one of the parties, acknowledged to have been paid. Under the stamp laws, there is no doubt that this acknowledgment, being unstamped, would not be admissible to prove the receipt of the money, but it is admissible for a different purpose.

[*LORD CAMPBELL*. — Was the question of payment of this sum wholly immaterial ?]

It was. The receipt of the money was admitted *aliunde*.

[*LORD CAMPBELL*. — How was the question immaterial when, by your statement that the receipt of the money was admitted *aliunde*, you show that it might * have been material evidence, and would have been so, but that it was proved by other means ?]

It was proved by the allegations on the plaintiff's own record. It was admitted on the record, and on his statement of the evidence.

[*LORD BROUGHAM*. — But if it was so perfectly immaterial, how did both parties allow the question of the admissibility of the paper to go before the Court, as if it was the pivot of the case ?]

Because, though the acknowledgment of the payment of this particular sum was immaterial, the paper of the statement of the account, which showed a particular balance existing at a particular period of time, was very material. Now it was the statement of the payment of this sum which alone required a stamp, and that payment being admitted on the record, the proof of it was wholly

immaterial to the defendant's case, and the question under these circumstances is, whether the paper tendered in evidence to prove a statement of accounts, made up and acknowledged at a particular time, was not tendered for a purpose distinctly collateral to that of an acknowledgment of the fact of payment of a particular sum of money contained in that account?

[LORD CAMPBELL. — This receipt would have been material to prove the payment of these 68*l.* on that particular day?]

The two facts stated on this paper are distinguishable. The first is an acknowledgment that a balance exists: that does not require a stamp. The second is an acknowledgment that the sum stated as that balance is paid: that does require a stamp. But if it is merely necessary for the defendants to show that there was an acknowledgment of the existence of a balance, they
 * 297 * may put in a paper for that purpose, although it is not stamped, and cannot be deprived of that acknowledgment of the general state of the accounts on a particular day, merely because the paper contains an acknowledgment of the payment of a sum of money which they do not want to prove.

[LORD CAMPBELL. — It seems to me that if the receipt was admissible, it would afford material evidence on the issue raised at the trial.

LORD BROUGHAM. — And though it might not have been wanted directly as a receipt for this money, it would have been useful to you in another way. Suppose a man says on a paper, "I acknowledge that there is a balance of 100*l.*," and then he adds a memorandum at the top of the paper, "Received 100*l.*" Suppose the top of the paper cut off. That would clearly be an acknowledgment of the payment of 100*l.*, and would require a stamp. Suppose it could be shown, by an independent witness, that the 100*l.* had been paid; that a bit of paper would not be necessary to one party as proof of payment of money. Still, if to the other it was important to show that that was the sum due, surely the whole paper, and consequently that part which contained the acknowledgment of payment, would be material?]

No; it would not. The two things are entirely distinct from each other; nor does the case supposed exactly meet the circumstances of the present. This case is the same as if J. S. gave a

receipt, dated, "Fleet Street, 1st January, 1848," and signed by himself. The payment of the money mentioned in the receipt could not be proved, unless the receipt was stamped; but to prove that J. S. was in London on *the day on which *298 the receipt bore date, it would be admissible in evidence.

One of the cases cited on the other side, that of *Shawcross v. White*,¹ exactly marks the distinction between accounts that do, and those that do not, require a stamp; for there the entries of payments were made at the time of payment, and in gradual reduction of a previously ascertained account. Of course such entries could not be receivable in evidence without a stamp. Any memorandum made at the time of payment is an acknowledgment of payment within the statute. But here the memorandum was made after the payment. The case of *Brookes v. Davies*² must be overruled, if this judgment is not reversed, and that case was referred to by the Court of Queen's Bench in giving judgment in *Millen v. Dent*,³ as a case of authority. *Birt v. Leigh*⁴ has nothing to do with the present case, for the mere question there was, whether an acknowledgment of payment of a balance, made at the moment that balance was paid, was not an acknowledgment of the receipt of a sum of money "in satisfaction of a debt," and therefore liable to be considered as a receipt in full. There too the issue was payment, and acceptance in full satisfaction, and the paper was offered as the material evidence to support that issue. Here, on the contrary, the paper was tendered for no other purpose than to prove a statement of account agreed on at a particular time, and for such a purpose it was clearly admissible.

*THE LORD CHANCELLOR. — The question in this case *299 was, whether a document which was stated to be a settled account as to larger sums, leaving a balance of 68*l.* 9*s.* 4*d.*, and which purported also to be a receipt for that balance, was admissible in evidence in a case where it was not tendered for the purpose of proving the payment of the 68*l.*, but for that of proving the state of the account at the time, as set out in the paper which showed such a balance to exist.

It is contended, on the one hand, that as this paper purports to

¹ 2 Barnewall & Alderson, 501 note.

² 2 Carrington & Payne, 186

³ 16 Law Journal N. S. Q. B. 374; 10 Q. B. 846. ⁴ 14 Meeson & Welsby, 177

be a receipt, it cannot be admitted in evidence, because it has not a proper stamp affixed to it. On the other hand, it is argued that the paper, though not admissible as a receipt, for the purpose of showing the discharge of the sum stated in it, is available for other purposes, — for purposes unconnected with the fact of the payment of that sum, — such, for instance, as the purpose of showing the state of the account as it stood before the payment of that sum. Upon a consideration of the cases that were referred to, both in the Courts of Scotland and of this country, but principally in the Courts of this country, I find that they often appear very inconsistent with one another, and they seem, in most instances, to be so little regulated by any fixed rule or principle, that it would be a hopeless task to endeavour to reconcile them. But, without absolutely reconciling them, it does seem to me that from all of them one principle may be extracted, which appears to have influenced the minds of the Judges who decided those cases, although, undoubtedly, questions may be raised upon many of them as to the mode in which that principle is to be applied.

It is obvious that there are three descriptions of documents upon which this question may be raised. * First : a mere simple discharge from an existing debt, which is, of course, within the stamp laws. Second : papers in cases where it becomes necessary to prove payment, not for the purpose of showing a discharge as between debtor and creditor, but for another and a collateral purpose. I must here remark that that expression, “collateral purpose,” seems to have been very much misunderstood, and to have led to a great deal of conflict and confusion to be found in the cases. If you produce a receipt, not to show the discharge of a debtor by his creditor from a particular demand, but for the purpose of establishing some other fact different from that of payment of the debt, you may be said to produce it for a collateral purpose. There was a case of this kind where the paper was produced, not for the purpose of showing that rent had been paid by a tenant, but that the relation of landlord and tenant had existed between the parties. That was, no doubt, a fact quite collateral to the fact of payment. But most of the cases go to show this, that if, in a particular instance, the matter to be proved is the payment of money, and the payment is to be proved by the production of a written document, of an acknowledgment of payment, or what is called a receipt, the Stamp Acts

immediately apply to such document so produced, and for such a purpose, whether it is for the direct purpose of proving payment as a discharge between debtor and creditor, or whether it is for an indirect and collateral purpose, as to show some right in, or advantage belonging to, a party, in consequence of such payment; where, for instance, a matter collateral is to be proved by the proof of the fact of payment, and that fact of payment is established by a receipt, such a case is clearly within the provisions of the Stamp Acts. That however is not the present case, but this explanation * of the acts does, in my mind, tend very much * 301 to reconcile many of the cases which have been referred to, and which, at first sight, appear hardly to be reconcilable with each other.

The third class of cases appears to me to be that within which the present falls. Where the document purports to be, on the face of it, a receipt, and indeed is so, but also purports to be something else, as in cases where debtor and creditor accounts appear set out between the parties, making a certain balance due, and the paper contains a receipt for the supposed balance, whether that balance was paid in money or only settled in account, if the object of the parties is, not to prove the fact of that particular balance having been paid, but merely to show that the parties to the account acknowledged the state of the account to have been such and such at a particular moment, the paper may be produced for this purpose, whether the money has been paid or not. Suppose that the account stood without any receipt or payment, that the balance existed but had not been paid, and the parties had merely agreed to ascertain how the account stood, or was to be rendered, at a particular time, and suppose that the items of the account thus rendered exactly balanced each other, then there would be no payment, for though there might be the signature of the parties to the documents, there would be nothing like a receipt, and consequently nothing to require a stamp. That is exactly the present case, except that here we have something added, which purports to be a receipt for the balance. But I cannot find any argument for warranting the conclusion that, because a paper which purports to be a receipt cannot be used without a stamp, that paper cannot be used for another object, the purport of which is * equally apparent on the face of it, and for which * 302 no stamp is necessary. I cannot find this conclusion war-

rented by any language in the Stamp Acts or by any authority in the decided cases.

In this case we have a debtor and creditor account, which must of course have been taken, and which is sworn indeed to have been taken, from the books of the parties. If one of these parties had signed a book instead of signing a paper, acknowledging the state of the accounts, can any one doubt that that would have been evidence against the party signing it? The items of payment occurring in an account do not require a stamp; no one contends that they do. The acknowledgment of the state of the account as it stands in the book is the same as it appears on the face of the paper which is signed, and this document thus made out, and recognised, and acted upon, and signed by the parties, is good evidence of the state of the account, and is tendered in evidence for that purpose, and for that purpose only, and for that purpose only is admissible.

Without attempting to go through the various cases which have been referred to, it appears to me that the principle I have stated will reconcile many of them (though with respect to some, that might be a difficult task), as it steers entirely clear of the Stamp Acts, which beyond all doubt it is the duty of all Courts to support, so far as the legislature intended they should be supported, but which all Courts must be anxious not to stretch beyond proper limits, so as to exclude evidence which justice to the parties requires should be admitted. It does not appear to me that we shall at all infringe upon the intentions of the legislature, as declared in the provisions of the Stamp Acts, if we hold the

document in this case to be admissible in evidence, so far
 * 303 as relates simply to the statement of an account, and so far as it is not produced for the purpose of proving the receipt of money. I am therefore of opinion that the paper was properly received in evidence at the trial, and that the Second Division of the Court of Session erred in rejecting it.

LORD BROUGHAM. — I am of the same opinion. It is undoubtedly the duty of all Courts to protect the revenue, and to see that the intentions of the legislature in that, as in other matters, are carried into effect. But it is not the duty of the Courts to strain the construction of these Stamp Acts, and, without regarding what was the real object of the legislature, to extend their provisions,

and so to deprive parties of the means of evidence, by which they might maintain, on the one side or on the other, their lawful contentions before Courts of justice. To do so would be to make the Courts instrumental, not only in inflicting injustice, but in levying many duties which were not intended to be imposed upon the subject, and would be adding a grievance to the grievances which, I am much afraid, we must admit that all taxes naturally occasion, be they ever so closely kept to their original intention, and be the law which imposes them ever so considerably or mildly administered. This being the rule, that we ought only to effectuate the intention of the legislature, and not to strain it, giving a larger scope to what is enacted than the legislature intended should be given ; — this, I say, being the general rule, we come to consider whether the decision of the Court below, in the present case, has not gone to the outside of that rule, and imposed the obligation of putting a stamp upon a paper not wanted to be used as a receipt, but wanted * for another and an entirely different * 304 purpose. I have looked very carefully, as my noble and learned friend near me has done, into the different cases which have been cited in the argument here, and which were cited, and, I must say, diligently and carefully examined, in the Court below ; and I have found it absolutely hopeless to attempt to reconcile all of them. Some of these cases are only *Nisi Prius* cases, such for instance as *The King v. Hall*,¹ tried before Mr. Justice Bayley, and *Brookes v. Davies*,² tried before Lord Wynford, and *Tebbutt v. Ambler*,³ tried before Lord Denman ; while others, such as *Horne v. Redfearn*,⁴ *The King v. The Inhabitants of Castle Morton*,⁵ and *Hawkins v. Warre*,⁶ and *Jardine v. Payne*,⁷ and *Goodyear v. Simpson*,⁸ were decided in banc. Now all these cases I have carefully examined, and I have found it impossible altogether to reconcile them ; but I agree with my noble and learned friend, that the rule which we are disposed to follow in this case will go, as nearly as circumstances will permit, to effect that object. The rule I take to be this : that where a paper is used for the purpose of proving the receipt of money in any way, it requires a stamp, and when it

¹ 3 Starkie N. P. C. 67.

² 2 Carrington & Payne, 186.

³ 9 Carrington & Payne, 60.

⁴ 4 Bingham N. C. 433.

⁵ 15 Law Journal N. S. Exch. 191 ; 15 Meeson & Welsby, 16.

⁶ 3 Barnewall & Alderson, 588.

⁷ 3 Barnewall & Cresswell, 690.

⁸ 1 Barnewall & Adolphus, 663.

is said that if it is used for a collateral purpose, it may be given in evidence without a stamp, that argument must be taken with the restriction which I now put upon it, for if it is sought to be used as evidence of the payment of money in any way, it is a receipt, and is used as a receipt, and therefore requires a receipt stamp

* 305 before it can be so * used. Some of the cases therefore

which state, as an exception to the rule, the use of a receipt for a collateral purpose, in which case they say it does not require a stamp, must be considered as stating the matter in a very vague, if not unintelligible way, because it may be for a collateral purpose, and yet if the paper is used in a way to confer on the party producing it a benefit on account of the proof of payment of money, — a benefit mixed up with the receipt or payment of money, so that upon the whole the receipt of money is the matter for which, or in respect of which, or connected with which, the paper is used, it requires, past all doubt, a stamp ; because it is, in one way or another, used as a receipt. But the same document, used for a totally different purpose, is not to be regarded as a receipt. It is not then used as a receipt, and consequently need not, as a condition precedent to being admitted in evidence, bear a stamp upon it. Suppose an account is produced, in which there are, on the one side, payments made by the party tendering it, and, on the other, debits to him, and in like manner credits and debits in the account of the other party, is it to be said that that account must have a receipt stamp to every one entry of payment ? Most certainly not. Then suppose the balance of the whole of this account to be stated at the end, that balance being made out by comparing the right and left hand sides together, it is not to be said, because the account states a balance against one party and in favour of the other, that is, so far as the latter is concerned, an acknowledgment of the receipt of all the money short of the balance, such as requires a stamp, nor, if the debit and credit side tally exactly with each other, so that there is no balance, there

* 306 being yet many entries * of payment on each side of the account, can it be contended that such an account would require a stamp for each of the entries of payment. One test whether such a paper as was produced in this case is used as a receipt or not, is this : would not the paper, as a statement of account between the parties, have been a perfectly good document to prove the case ? If so, was it made to that extent less so by the

fact of having something else added to it? Suppose you had, with a pair of scissors, cut off the receipt altogether, — cut off the receipt and the names, — most undoubtedly it would have been admissible. Well then, here, though the receipt was produced, it was not used as a receipt, but for another and an entirely different purpose, — for a purpose which, as a statement of account between the parties, was a perfectly lawful purpose. If then it was not used as a receipt, a stamp was not necessary to render it admissible. On the whole, therefore, I am of opinion, though reluctantly, as the case was very carefully considered in the Court below, that this judgment must be reversed.

LORD CAMPBELL. — With respect to this question of evidence, my opinion is, that if a document, purporting to be a receipt, but unstamped, is offered in evidence during a trial, if it would be evidence when stamped as a receipt to establish any point that is litigated between the parties, it cannot be received for a collateral purpose, merely because of the party's saying, "I offer it for a collateral purpose only, so you must take the receipt part as not written." I think that you cannot, in that manner, abstract a part of the document, and give the rest in evidence. The criterion therefore seems to me to be, not whether the party seeks to make use of it as a receipt, but whether it can be made use of to * settle any question of payment of credit or debit, litigated * 307 between the parties; and, in this case, had this sum of 68*l*. 9*s*. 4*d*. been in dispute, I should have thought that this document would not have been receivable in evidence for any collateral purpose. Just observe the danger that would arise from holding the reverse. Can a Judge say to the jurymen, "You are to discharge from your mind every thing that, on the face of the paper, applies to the receipt of money; it is not upon stamped paper, and it is not therefore legally in evidence, although, if stamped, it would have decided the controversy between the parties: but you may look at the other part of the paper, and that other part you must apply to another and a collateral purpose?" It would be found difficult to adopt such a course, and dangerous to rely on its success. I find no case that has gone so far as to lay down a doctrine of that kind; because, although the language of the Judges is, that the paper may be given in evidence for a collateral purpose, still, upon carefully examining the various cases that have

been cited, and in which the expression has been employed, it will appear that in none of them could the paper have been used to prove any issue of debit or credit of a particular sum that had been taken between the parties. In the present case it was wholly useless for such a purpose.

I think therefore, and I am very glad to think so, that, consistently with the notions I have always entertained, and consistently with the principles to be deduced from decided cases, this paper is admissible in evidence, because it does not prove or tend to prove any issue as to the payment of a particular sum raised between these parties. It is quite clear that the justice of the case

* 308 requires its admission, and I should therefore have * deeply regretted to feel myself under the necessity of saying that it ought not to be admitted. The learned Judge who presided at the trial states the question on the objection to the admissibility of the paper in these terms: "On the part of the defenders it was contended, that as the payment of the particular sum of 68*l.* 9*s.* 4*d.* had been admitted, and as that sum was not included in the demand made, the paper in question was in no sense whatever used to instruct payment of that sum, the payment of that sum not being a matter in dispute between the parties."

Upon this statement I come to this conclusion, that the payment of that sum was wholly immaterial; that it was not in question between the parties; and therefore, that if the receipt had been stamped, it would not have been available as a receipt. That being the case, it comes within the principle which I have before stated, and which I believe to be the sound one, that as it would have been of no benefit as a receipt if stamped, it may be, though unstamped, received in evidence. This removes the case from what seems to me the dangerous ground of resting its admissibility on the party's assertion that he produces it for a collateral purpose.

Under these circumstances, I quite concur as to what ought to be the result of this appeal. I think that this document, although it contains a receipt for this sum, the balance of 68*l.* 9*s.* 4*d.*, as it could not, even if stamped, have been used for any purpose respecting the payment of that sum, ought to have been received for the collateral and wholly distinct purpose of identifying the statement of the accounts made at a certain period of time between these parties.

Interlocutor reversed, and verdict in the Court below ordered to be entered up for the appellants.

1849. March 13, 20.

WILLIAM M'EWAN and sons, *Appellants.*
 JAMES and ARCHIBALD SMITH, and others, *Respondents.*

Sale of Goods. Delivery Order. Vendor's Lien.

The giving of a delivery order does not, without some positive act done under it, operate as a constructive delivery of the goods to which it relates, nor deprive the owner of the goods, who gave it, of his right of lien for their price, even as against the claims of a third person who has *bonâ fide* purchased them from the original vendee.

S. the owner of sugars, sold them to B., to whom he gave a delivery order addressed to his agent A., and took a bill of exchange in payment of the price. B. sold the sugars to M., and transferred to him the delivery order. The sugars were in the warehouse of L., in whose books they were entered as received by him "from A., on account of S." The sugars were weighed and invoiced by A. upon the order of S. Neither B. nor M. took any steps to act on the delivery order, till a rumour arose of B.'s insolvency, when M. presented the order to A., and received from him a fresh order, addressed to L., the warehouse keeper. Before the sugars could be actually delivered under this order, A. removed them, under the direction of S. :—

Held, affirming the judgment of the Court below, that the possession of the goods had never been changed, and that S. might still enforce upon them his lien as vendor.

THIS was an appeal against a decree of the Court of Session, in a suit in which the appellants had claimed possession of forty-two hogsheads of sugars, under the following circumstances: The sugars in question were originally the property of the respondents who had imported them. James Alexander acted, at Greenock, as *the agent for the respondents. On the *310 sugars arriving there, in July, 1843, he put them into a bonded warehouse belonging to Messrs. Little and Co., where they were entered as "received from James Alexander for J. and A. Smith." The respondents afterwards entered into a contract for the sale of these sugars to Messrs. James Bowie and Co., and gave them the usual delivery order in these terms, addressed to Mr. Alexander, their agent: "Glasgow, 15 Aug., 1843. You will please deliver to the order of Messrs. James Bowie and Co., the under-noted 42 hhds. of sugar, ex. St. Mary, from Jamaica, in

bond." The contract for sale was alleged to have been at first for cash, with an allowance of two per cent. discount, but afterwards the respondents consented to take a bill at four months. On the 15th of September, 1843, Messrs. Smith wrote to Alexander, "We will thank you to weigh over the forty-two hogsheads of sugar, ex. St. Mary, sold to Messrs. James Bowie and Co., 15th ult.," to which Mr. Alexander answered, "Messrs. J. Bowie and Co.'s agent has got no order of delivery yet for the forty-two hogsheads of sugar, and cannot receive them; it would be as well for you to let these gentlemen know, that I will weigh them over on Monday or Tuesday." On the 18th of September, Smith and Co. wrote to Alexander, acknowledging this letter, and saying, "Bowie and Co. promised to forward order of delivery for the forty-two hogsheads of sugar to their agent at Greenock, on Saturday, and we hope they are by this time weighed over, as we are anxious to forward account sales as soon as possible." On the 19th of September, Alexander wrote to say, "I enclose weights of the forty-two hogsheads of sugar, Messrs. Bowie and Co.'s agent having no word about them,"

and together with this letter he sent his own account for *311 * money paid for warehouse rent, and likewise his delivery charges. The weight note in this letter was headed, "Weights of forty-two hhds. of sugar, ex. St. Mary, Jamaica, delivered Messrs. James Bowie and Co., per order, 15th Aug. 1843." The respondents, on this weight note, made out their invoice to Bowie and Co., which invoice was however dated as of the 15th of August, the day of the sale. On the 25th of September, the appellants, to whom Bowie and Co. had in the mean time sold the sugars, sent to the office of Alexander, and produced the original delivery order of the respondents, which had been given by the respondents to Bowie and Co., and by Bowie and Co. transferred to the appellants, and which had been expected by Alexander as his authority for weighing the sugars. The respondents then received from Mr. Alexander's clerk the following note: "Delivered to the order of Messrs. W. McEwan and Sons, this date, forty-two hogsheads of sugar, ex. St. Mary. James Alexander, per J. Adams."

The respondents about this time heard that Bowie and Co. were in difficulties, and thereon wrote, upon the 26th of September, to Alexander, in the following terms: "I have just heard of Bowie and Co.'s failure. Take immediate steps to secure our forty-two hogsheads of sugar, ex. St. Mary, lately sold them, if they are still

in the warehouse ; take a man of business with you to attend to this without delay." In fact, although the note given by Alexander's clerk contained the word "delivered," the sugars had not been removed from the bonded warehouse of Messrs. Little, and there was some doubt whether the word had not been originally written "deliver," and the last two letters added afterwards. Alexander, upon the receipt of this note from the respondents, * removed the sugars from Messrs. Little's to Messrs. * 312 Kerr's warehouse, and, on the 26th of September, wrote to the respondents the following letter : " I have got all the papers passed through the Custom House for transferring the forty-two hogsheads of sugar, ex. St. Mary, and they will be removed immediately after 10 o'clock to-morrow. They appear now in the Custom House books as removed. I will attend to your instructions regarding these sugars, and I will take care in the mean time that no person has any thing to do with them." On the morning of the 27th of September the actual removal took place, and with the sugars Alexander wrote the following note to Kerr : " I have put into your warehouse this day, on account of Messrs. J. and A. Smith and Co., Glasgow, forty-two hhds. of sugar, ex. St. Mary, and I request you will not deliver them to any one without my order as agent for these gentlemen." The authority to remove was obtained from the Custom House by Alexander, in his own name alone, and the entry of the sugars in the books of the new warehouse was in the same form. On the 27th of September he wrote to the appellants the following account of the transaction : —

" The forty-two hogsheads sugar have been removed to another warehouse, and I have intimated to the proprietor of said warehouse that he is to hold them to your order.

" The order for these sugars was presented on the evening of the 25th inst., in the usual way ; but the young man that came with it from the agents of Messrs. William M'Ewan, Sons, and Co., said that he wished them put in my books as delivered to these gentlemen ; *and from the order of delivery being transferred to them*, my young man (for I was not * within at the * 313 time) *noted in the little book in which the weights are taken when weighing over*, ' delivered to Messrs. William M'Ewan, Sons, and Co., per order of 25th September, 1843,' and at their request he gave them a slip of paper to this effect : —

“GREENOCK, 25th September, 1843.

“Delivered to Messrs. William M'Ewan, Sons, and Co., this date,

“W

“WH 12 } 42 hhds. sugar, ex. St. Mary, from Jamaica.
“D 30 }

“P. JAMES ALEXANDER,

“JOHN ADAMS.’

“This was done without any thought that any thing was wrong, although it is not the custom in transfer orders to ask such a thing to be done; but they neither intimated to any officer of customs, nor to the agent for the warehouse, that they wished them transferred or stopped in any way; and this was done in your behalf as soon as I received your letter, which was about half past eleven, first, verbally, and then by letter to custom-house officers and warehouse agent; and in the regular import book which I keep, where all the purchasers' names are marked, they are neither marked off to one party nor another, *with the exception of the first ten hogsheads to Bowie and Co., my young man being just in the act of marking them off when your letter came.* I will be very glad if I can give you any further explanation in this matter.”

On the 29th September the appellants presented in the usual form a petition to the sheriff of Renfrewshire, in which, according to the Scotch form, Alexander was joined with Smith and Co. as a defender, praying that the sugars might be ordered to be

* 314 restored * to them. The cause was heard in the Sheriff's

Court, and the final decree of that Court was, “that in respect that the sugars in question had never come into the possession of M'Ewan and Co. by delivery, either actual or constructive, the petition was dismissed, with costs.”

This decree was duly removed into the Court of Session, where the judgment of the Sheriff was, first, by an interlocutor of the Lord Ordinary Wood, and afterwards by the opinions of all the Judges (except Lords Cuninghame, Moncreiff, and Ivory), affirmed, and a decree made accordingly.

The present appeal was brought against that decree.

Mr. Turner and *Mr. Anderson* for the appellants:—

The judgment of the Court below proceeded upon the provisions

of the 5 & 6 Vict. c. 39, § 1, which was passed to amend and render effectual the 6 G. IV. c. 94, § 12, on the construction of which some discussion had arisen in the Courts in England.¹ It was the intention of these statutes to give an absolute right of possession, and a power to dispose of goods to parties who were only in the apparent possession of such goods, being merely entrusted with them as agents for the original owners. This intention of the legislature is fully expressed in the preamble of the Statute of the 5 & 6 Vict.² Here the letter of the *15th of August *315 gave to Alexander a complete right of dealing with the goods, and fully entrusted him with them, according to the intention of the statute. Nay, more; Bowie and Co. became, and were by that letter declared to be, the owners of the goods, for Alexander was directed to deliver the goods to them. If so, their title to possession was complete from that time. Then comes the question whether they did not obtain at least a constructive possession of the goods. The answer to that question must be in the affirmative. The goods were lying in the bonded warehouse of Little and Co., in the name of Alexander. It is true that the entry in

¹ See *Hatfield v Phillips*, 12 Clark & Finnely, 343.

² Which, after reciting the 6 G. IV. c. 94, says: "And whereas advances on the security of goods and merchandise have become a usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bonâ fide* advances upon goods and merchandise as by the said-recited act is given to sales, and that owners entrusting agents with the possession of goods and merchandise, or of documents of title thereto, should in all cases where such owners by the said-recited act or otherwise would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances *bonâ fide* made on the security thereof": and then, reciting that much litigation had arisen on the construction of the recited act, it provides that, "from and after the passing of this act, any agent who shall thereafter be entrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bonâ fide* made by any person with such agent so entrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof; and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding any person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent."

*316 Messrs. Little's books was "Alexander * for Smith," but that recognition of him as agent only brings him within the last words of the provision in the statutes. He was entrusted with the goods, and had the goods and the title to them in his possession. The order to him was in substance a delivery order, and the most positive recognition of the absolute title of Bowie and Co., to these goods was furnished by Smith and Co., not only by the note of the 15th of September, but by the invoice they afterwards furnished, which they dated back to the 15th of August, and in which they described the sugar as "delivered to Bowie and Co." Up to this time Messrs. Bowie and Co. had not actively enforced their rights, but on the 25th of September, the appellants, to whom they had sold the sugars, and to whom they had transferred the delivery order, gave a notice to Alexander, which notice operated as a completion of the transfer, if any such completion had been necessary. It may be admitted that Alexander had a lien on the sugars for the rent he had paid for them, and for his commission, but that lien was good only as against his employers, and not as against third parties. Nor were the sugars attempted to be detained under pretence of this lien. Alexander did not claim any right over the sugars in virtue of the debts due to him; he made no objection on that account to complete the delivery by the transfer order of the 25th of September. He did not claim a lien as against any one, not even as against the respondents; for on their order he at once removed the sugars from Little's to Kerr's warehouse. If he did not claim a lien as against them, he could not claim it as against others on their account. Any difficulty on account of his lien is therefore out of the case. If Smith and

*317 Co. had, by what they had previously * done, lost all right over these sugars, they ought to be restored to the appellants to whom that right had been lawfully and validly transferred.

The facts here are at least as strong as those in the cases of *Hawes v. Watson*¹ and *Crawshay v. Thornton*,² in each of which an acknowledgment of title being once made to third parties, was held conclusive in their favour as against those who made it. Here that acknowledgment was made by Alexander, and by Smith and Co. themselves, and they have not now any right to stop the goods which, in virtue of what they themselves did, have become the property of the appellants. Here too the delivery order was

¹ 2 Barnewall & Cresswell, 540.

² 2 Mylne & Craig, 1.

given by the respondents themselves, and is consequently conclusive against them; *Pickering v. Busk*.¹ In *Dizon v. Yates*,² which will perhaps be cited on the other side, the vendor had not given any delivery order, but merely an invoice of the goods, which remained in the vendor's warehouse, and the possession of which could not lawfully be changed without such an order being given and acted on. That case is therefore inapplicable to the present. In *Townley v. Crump*³ a delivery order was given, but was never acted on, and the question there arose between the original vendor and the assignees of the vendee, so that no interests of third parties were concerned.

A delivery order, acknowledged by the warehouseman, operates as a complete transfer of the property mentioned in it, at least as between a warehouseman and a third party; *Whitehouse v. Frost*,⁴ *Hurry v. Mangles*,⁵ *Harman v. Anderson*,⁶ *Stonard v. Dunkin*,⁷ *Hammond v. Anderson*.⁸ Here the delivery order had been sufficiently acted on to bring this case within the principle of those now cited; for Alexander stood in the place of the warehouseman, and his note of the 25th of September was, in substance, a delivery of the goods.

The Attorney-General and *Mr. Blackburn* for the respondents:—

This case is not at all affected by the Statutes 6 G. IV. c. 94, and 5 & 6 Vict. c. 39, which apply only to the cases of factors and agents. Bowie and Co. were neither factors nor agents, nor, if Alexander could be conceived to bear that character, had their dealings been with him as such. They and the appellants were principals dealing with his principals, and all that he did was what a mere clerk of the principals, resident on the spot, might have done. This distinction runs throughout the case, and makes many of the arguments on the other side inapplicable.

There certainly was no actual delivery of the property, nor can it be truly said that there was a constructive delivery of it to the appellants. A delivery order does not alter the property, if any thing, beyond the mere act of delivery, remains to be done after

¹ 15 East, 38.

⁵ 5 Barnewall & Adolphus, 313.

⁴ 4 Adolphus & Ellis, 58.

⁸ 12 East, 614.

⁶ 1 Campb. 452.

² 2 Campb. 243.

⁷ 2 Campb. 344.

¹ 1 New Rep. 69.

it has been given. Here the weighing of the goods had not taken place at the date of the first delivery order, and the necessity to do that act prevented the delivery order from having the effect of an actual transfer of the goods; *Busk v. Davis*.¹ This *319 rule was acted on *by Lord Chief Justice Gibbs, in *Withers v. Lyss*,² and those cases may be considered as establishing the law on that point. This question has been recently discussed in a case in the Court of Common Pleas, and the doctrine now stated was there maintained under circumstances of some hardship. That was in the case of *Jentyns v. Usborne*.³ There beans were shipped, at Leghorn, for A., but in a greater quantity than he had ordered. The bill of lading for the whole cargo was indorsed to him. When the letter enclosing it arrived, he accepted a bill for such of the beans as he had ordered, but declined to take the residue. D. took the residue, and thereupon A. wrote him a letter, acknowledging such residue to be his, and enclosing a delivery order for that residue. D. accepted a bill drawn for it, and paid this bill when at maturity. Before the arrival of the ship, D. sold this residue to E., who accepted a bill for the amount, and received A.'s letter and delivery order. Before E.'s acceptance became due, and before the arrival of the ship, E. stopped payment. D. was held entitled to stop the delivery of the residue, even as against a person who had advanced money to E. upon it, and had received as security for the advance A.'s letter and delivery order. The Court held that the delivery order given by A. was not equivalent to a bill of lading, and expressly affirmed the holding of Mr. Justice Burrough, in *Akerman v. Humphery*,⁴ that the giving of a shipping note and of a delivery order does not make a change in the property. That case comes very near to the present, and shows the true value of a *320 *delivery order, and the small effect it has in making a transfer of the property.

Then, has there been any constructive taking of possession? There has been none. A mere formal act will not, under such circumstances, amount to a taking of possession; there must be with that formal act something done by the carrier which is equivalent to a delivery up of possession, or to a consent to hold possession on account of the person claiming the title to it; *White-*

¹ 2 Maule & Selwyn, 397.

² 7 Manning & Granger, 678.

³ 4 Campb. 237.

⁴ 1 Carrington & Payne, 53.

head v. Anderson.¹ There the agent of the assignees of a bankrupt went on board a timber ship to take possession of a cargo of timber, and touched the timber, and gave notice to the captain, who made no objection to the agent's title, but promised to deliver the timber on being satisfied as to the freight. This was held not to be such a taking of possession as to put a stop to the right of stoppage *in transitu*. In the present case the appellants did not do so much; for though the captain was the person having the actual custody of the timber, Alexander was not the person having the actual custody of the sugars. They were in the warehouse of the Messrs. Little, entered in the name of Alexander, it is true, but entered with the description of him as agent for the respondents. The notice to Alexander amounted therefore to nothing. The cases of *Hurry v. Mangles*,² and *Whitehouse v. Frost*,³ do not apply, for in each of them the vendor acted as warehouse-keeper, and in the first received rent from the vendee, and in the other * accepted from him notice of a sale to a third party. * 321 Nor is *Harman v. Anderson*,⁴ or *Lucas v. Dorrien*,⁵ applicable here, for each of them depended on the question whether the warehouseman had accepted and acted upon the notice of transfer; while here there was absolutely no notice whatever given to the warehouseman.

This is the case of a sale made by a vendee before taking possession of the goods, and consequently is one where the purchase is one made at the risk of the party making it; *Dixon v. Yates*; ⁶ for though the sale gives a title to property, it does not confer a right of possession; *Bloxam v. Sanders*.⁷

Then the terms of the letter of the 15th of August are relied upon as if they were an estoppel as against the respondents. But if that mode of treating such a paper was adopted, its effect would be to give to a delivery order that of a bill of lading, which cannot be. *Farina v. Home*.⁸ The introduction of the words, "or order," will not change the character and effect of the instrument. However frequently assigned over, it would merely amount to an authority to Alexander to take the goods out of the possession of

¹ 9 Meeson & Welsby, 518; see *Stoveld v. Hughes*, 14 East, 308.

² 1 Campb. 452.

³ 12 East, 614.

⁴ 2 Campb. 243.

⁵ 7 Taunton, 278; 1 Moore, 29.

⁶ 5 Barnewall & Adolphus, 313.

⁷ 4 Barnewall & Cresswell, 941.

⁸ 16 Meeson & Welsby, 119.

Little and Co., and to deliver them to some one else, but could not make the instrument operate, by mere delivery, as an actual transfer of the goods.

This is not like the case of *Dixon v. Baldwin*,¹ or that of *Dodson v. Wentworth*,² a case where some perfect act of delivery has taken place, so as to effect an absolute transfer of the possession of the goods. Here the sugars always remained in Little and Co.'s bonded warehouse, in the name of the respondents, the character of their agent being that alone which was borne by Alexander, and nothing being ever done with the original delivery order to constitute a delivery of the goods. It was never presented to Little and Co., nor until Alexander removed the goods from their warehouse to that of Kerr, were they ever called on to do any act which might amount to a recognition of its authority. It might, therefore, be admitted, that a delivery order acted on by the holder of it, and by the warehouseman who was in actual possession of the goods, would transfer the property: still, the respondents would be unaffected by that admission, for nothing of the sort occurred here.

Mr. Turner, in reply. — The transfer of possession here was complete, if not by an actual, at least by a constructive, delivery. It would be an encouragement to fraud to allow a vendor to give a delivery order to a vendee, and then, when a third person, on the faith of that delivery note, had bought the goods, to permit the original vendor to step in and claim them against his own order and in defiance of the *bonâ fide* claims of a purchaser who had purchased on the authority of it. Here too the circumstances are stronger than the mere giving of a delivery order, for the respondents throughout acted in recognition of the validity of that order; it was afterwards recognised by Alexander himself (for the act of his clerk must be taken to be his act), and his note of the 25th of September was a confirmation of that of the 15th of August, and amounted in itself to a constructive delivery of the sugars. So that here was a delivery order given to a first vendee, constantly recognised by the vendor, and a second and confirmatory order given to the second vendee. After such acts, the original vendor cannot step in and defeat the *bonâ fide* rights of the second vendee.

¹ 5 East, 175.

² 4 Manning & Granger, 1080.

THE LORD CHANCELLOR. — The facts of this case are short and simple. Certain sugars, imported by Messrs. Smith and Co., the respondents, were placed in a bonded warehouse belonging to Messrs. Little, at Greenock. These sugars were entered in the books of Messrs. Little in this form: "James Alexander for J. and A. Smith." They remained in this warehouse till the insolvency of some parties, to whom a portion of them had been sold, raised a question of ownership. The respondents sold this portion to Bowie and Co., and gave them a delivery order addressed to Alexander, who acted, at Greenock, as the agent for the respondents. No step was taken by Bowie and Co. with regard to taking possession of these sugars, but they were sold by Bowie and Co. to the appellants. On the 26th of September, the respondents wrote to Alexander that they had just heard of Bowie and Co.'s failure, and added, "Take immediate steps to secure our forty-two hogsheads of sugar, ex. St. Mary, lately sold them, if they are still in the warehouse." Upon that, Alexander, who acted for the respondents, caused the goods to be removed into another warehouse. So far these facts show no matter of dispute at all. The respondents, the vendors, had not parted with the possession, which remained as upon the first arrival of the sugars. Before the possession was parted with, or the custody of the sugar altered, * they were removed by the respondents' order into another * 324 warehouse. ●

The question now before the House is raised, not on behalf of Bowie and Co., the original vendees, but on behalf of the appellants, to whom the sugars were sold by Bowie and Co. On the sale to Bowie and Co., the respondents gave them a delivery note in these terms: "Mr. James Alexander. Dear Sir, — You will please deliver to the order of Messrs. James Bowie and Co., the under-noted forty-two hogsheads of sugar, ex. St. Mary, from Jamaica, in bond," and the sugars were then described, so as to identify them. Messrs. Bowie and Co. did nothing under this note to take possession of the sugars, but simply sold them to the appellants, who likewise allowed them to remain untouched in the hands of Little and Co. Upon the 25th of September, however, they applied, not to Little and Co. in whose warehouse the goods were bonded, but they went to the place of business of Alexander, where they saw a clerk named John Adams, who gave them the following memorandum: "Greenock, 25th September, 1843.

Deliver to the order of Messrs. W. M'Ewan, Sons, and Co., of this date." That memorandum is not addressed to any body, and it appears that the word "deliver," which was originally written in it, has been altered to "delivered." Whatever may have been the object of that alteration, that object entirely failed, for it was nonsense to say that by that memorandum the goods were delivered. They were not delivered in fact, and this memorandum did not constitute a delivery, for they were not in the hands of Alexander, by whom the document was given, but in those of the warehousemen, Messrs. Little, to whom the order was directed. It

* 325 was not the acknowledgment of a fact done by the * person who made the acknowledgment, but was an order to a third person, who might or might not think fit to execute it. It makes no difference that the memorandum was written by the clerk, — if Alexander had himself written it, no more force would have been attributable to it. He was only the agent for the vendors, under whose authority alone he could act. The goods were in the warehouse of Little and Co., and all he could have done would have been to give directions to the warehousemen, as Adams did in fact give them.

It is therefore clear, that up to the 26th of September, nothing had been done which changed the possession of those sugars. They remained in the warehouse of Little and Co., in the same state in which they had been placed there on their first arrival. It follows, therefore, that when on that day the vendors heard of the failure of Bowie and Co., they had a right to stop the delivery of these sugars. But this right is denied on several grounds made in argument for the appellants, who are the sub-vendees of these sugars. First, it is said, that though the delivery note does not pass the property as a bill of lading would have passed it, by being indorsed over from one party to another, still it operates as an estoppel upon the party giving it, so far, at all events, as a third party is concerned; and it is argued that it is a kind of fraud for a person to give a delivery note, which the person receiving it may use so as to impose upon a third person, and then to deprive that third person of its benefit. But that argument is merely putting the argument as to the effect of a delivery note in another form, and it assumes that such a document has all the effect of a bill of lading. But as the nature and effects of these two docu-

* 326 ments are quite different from each other, it seems to * me

that such an argument has no foundation at all, and cannot be adopted without converting a delivery note into a bill of lading.

The next argument is, that the possession of the goods was changed by what took place with Alexander on the 25th of September. But it is clear to my mind that Alexander was not himself in actual possession of the goods, and that what he did at that time could not change the possession. He was only the agent of the vendors, and was so named in the books of Little and Co. He, therefore, merely stood in the position of a person through whom the respondents meant to exercise their rights and powers as owners of the goods.

It was then said that the circumstances here gave a peculiar effect to this note of Alexander's on the 25th of September. It was contended that, assuming the delivery note given to the first vendee to have no effect in changing the property, yet, if the second vendee comes to the original vendor, and obtains a new order, the vendor cannot afterwards say that he has not been paid by the first vendee, and so defeat the title of the second vendee, the sale to whom he had in fact sanctioned, by making that second note, and dealing with him as a party entitled to the custody of the goods. But this argument is answered by the observation that Mr. Alexander is here assumed to have an authority, which, in fact, he never possessed, for, in truth, he possessed no authority but that which the first delivery note, given to Bowie and Co., had conferred upon him. Entirely putting out of view the circumstance, that the note of the 25th of September was signed by the clerk, and supposing it to have been signed by Alexander himself, I am of opinion, that it * gave the second vendee * 327 no better title than the first delivery note gave to Bowie and Co. It is not possible to construe this note as a dealing between the vendors and the second vendee, when, in fact, there was no communication whatever between them.

Being therefore of opinion, that the circumstances, as they stand, clearly leave the title to the goods in the vendor, and that those subsequent transactions which are said to take this case out of the ordinary rule, and to give a title to the second vendee, have no operation for that purpose, I move to affirm the interlocutors appealed from, with costs.

LORD BROUGHAM. — I am entirely of the same opinion. I do

not think that on the 25th of September, Alexander had any authority which he did not originally possess, and that original authority was clearly nothing more than that of an agent of the owners. Alexander was not in custody of the goods; he was not authorised to sell them or deal with them in any way. I perfectly agree that the memorandum written on the 25th of September, means nothing, and that the word "delivered," even supposing that the last syllable had not been added, but that the word had been originally so written, is mere nonsense. The goods were not delivered by the effect of that memorandum. The delivery order given by the respondents to Bowie and Co. has been argued upon as if it had the effect of a bill of lading, but that is not the case. The case appears to me entirely free from doubt, and though I have great respect for the opinions of the learned judges who constituted the minority in the Court below, I have no hesitation whatever in saying, that the interlocutors appealed from ought to be affirmed, with costs.

* 328 * LORD CAMPBELL. — The single point in this case is, whether Smith and Co., the respondents, the original vendors of the goods, retained their lien upon them. Several of the Judges in the Court below discuss at great length the question of stoppage *in transitu*. That doctrine appears to me to have no more bearing on this case than the doctrine of contingent remainders. One of these learned Judges calls the right of stoppage *in transitu* a new right, the operation of which, he says, he would not extend. I cannot say that I agree with him. What is stoppage *in transitu*? It is this, that where a vendor of goods has to send them to a vendee, and has for that purpose parted from them to a carrier, he may, upon hearing of the insolvency of the vendee, while they remain in the hands of the carrier, and, before delivery to the purchaser, stop their delivery. I think that this doctrine of stoppage *in transitu* is a most just and equitable doctrine, and I would by no means strive to limit its operation. But be that doctrine what it may, it has nothing to do with this case, which is, whether the lien of the vendor of goods remains or has been lost. There cannot be a doubt that after sale of the goods, the vendor has a lien on them for the price, so long as they remain in his possession, and this is a doctrine as old as any doctrine connected with the purchase and sale of goods. Here the goods had been sold,

but the price of them had not been paid. Then how is the lien of the vendor lost? First, it is said it has been lost by the giving of the delivery order of the 15th of August. But the Lord Chancellor has clearly and satisfactorily established that this is not the case, for a delivery order alone does not change the possession. Then it is said, that here there has been a subsequent * sale, and that the price has been paid by the second ven- * 329 dee, who has obtained from Alexander an order to take the sugars away, and that, consequently, these circumstances amounted to a recognition of the first delivery order, and were equivalent to an actual delivery of the goods to the second vendee. But this argument altogether proceeds upon the assumption that a delivery order has the effect of a bill of lading. If a bill of lading is given, and that is indorsed for a valuable consideration, that would take away the right of the vendor to prevent the delivery of the goods; but that is not so with a delivery order. It would be a gratuitous dictum to say, that, according to the usage of trade, or the law of the land, such would be the effect of a delivery order.

It is said that the delivery order, and the subsequent payment of the price of the goods by the second vendee, take away the lien of the vendors. These acts do not seem to me to do so, for, first, this price was not paid to the original owners, and then, to treat what passed between other people as an estoppel to the original owners, is to give the delivery order the effect of a bill of lading, and thus the argument again and again comes round to that point for which no authority in the usage of trade or in the law can be shown. No fraud has been practised here by the owners, although the second vendee has undoubtedly been a sufferer. But then it is said that possession was given of these sugars, if not by the delivery order of the 10th of August, at least by the act of Alexander, on the 25th of September, the answer to which is, that Alexander had not then the custody of the sugars; he was the mere agent or broker, not the warehouse keeper of the owners, and * the goods were not in his possession, but in * 330 the possession of the warehouse keepers, who alone could actually change the possession of the sugars, and, therefore, in fact, the very foundation of the argument, as to the change of possession, fails.

There has been some negligence on the part of M'Ewan and Co., who, when they bought from Bowie and Co. sugars which

were known to have belonged to the respondents, should have ascertained that the purchase money had been paid for them, or should at least have taken care that the sugars were duly transferred into their names, instead of which they continued to act with the utmost supineness, until the intimation of Bowie and Co.'s insolvency became noised abroad, when they sought, by going to Alexander's and getting the memorandum from him, to change the possession of these sugars, which they could not legally do in that way.

The decision of this case will not in the least degree embarrass commerce, but will tend to make men more careful and watchful in their dealings.

Interlocutors of the Court below affirmed, with costs.

*381

*PIERS v. PIERS.

1849. March 15, 19, 22.

LOUISA ADELAIDE PIERS and FLORENCE A. M.	} <i>Appellants.</i>
DE KERRIGUEN (formerly PIERS), . . .	
SIR HENRY SAMUEL PIERS, Baronet, . . .	<i>Respondent.</i>

Marriage. Evidence. Presumption. Costs. Practice. Appends.

The question of the validity of a marriage cannot be tried like any other question of fact which is independent of presumption, for the law will presume in favour of marriage.

There is a strong legal presumption in favour of marriage, particularly after the lapse of a great length of time, and this presumption must be met by strong, distinct, and satisfactory disproof.

Where, therefore, two persons had shown a distinct intention to marry, and a marriage had been, in form, celebrated between them, by a regularly ordained clergyman, in a private house, as if by special licence, and the parties, by their acts at the time, showed that they believed such marriage to be a real and valid marriage, the rule of presumption was applied in favour of its validity, though no licence could be found, nor any entry of the granting of it, or of the marriage itself, could be discovered; and though the Bishop of the diocese (during whose episcopacy the matter occurred), when examined many years afterwards on the subject, deposed to his belief that he had never granted any licence for such marriage.¹

¹ See *Bargate v. Shortridge*, 5 House of Lords Cases, at p. 308.

The House will not grant the costs of an appeal to come out of the estate, upon a mere miscarriage of the Court below, where the subject of litigation, though in the result decided by the Court, was one which might have required to be tried as a question of fact.

The House strongly condemned the custom of each party printing an Appendix to his Case, and desired that, in future, a joint Appendix might alone be printed.

THIS was an appeal against a decree pronounced in the Court of Chancery in Ireland, by Lord Chancellor Brady, in a suit instituted by the appellants on the 29th October, 1845, in which they sought to establish * their title to a charge for raising * 332 a sum of 4000*l.* out of certain estates, now in the possession of the respondent Sir H. S. Piers. The appellants claimed to be the lawful daughters of the late Sir John Bennett Piers, who when he became of age, in 1794, had joined his father, Sir Pigott W. Piers, in suffering a recovery of certain lands settled upon the father's marriage. By the re-settlement of the estate then made, it was "provided, declared, and agreed upon, by and between all the parties thereto, that it should and might be lawful to and for the said John Piers (and the other persons to whom estates for life were therein limited), when and as they should respectively be in possession of the premises and hereditaments aforesaid, by virtue of the limitations aforesaid, to settle by way of jointure for any wife or wives, a sum of money not exceeding in the whole the sum of 600*l.* a-year, which jointure or jointures should be in bar of dower or thirds, and also that they the said John Piers and the said other persons therein named, to whom estates for life were limited as aforesaid, respectively, as they should be in possession under the limitations aforesaid, might charge said premises and hereditaments, as and for a portion or portions for younger children, with a sum of money not exceeding in the whole the sum of 4000*l.*"

Sir Pigott William Piers died in the month of April, 1798, leaving his eldest son John (who was thenceforth known as Sir John Bennett Piers), and five other sons, him surviving, three of whom died in the lifetime of Sir John, without issue. The fifth son Frederick died after his father, leaving the respondent, now Sir Henry Samuel Piers, his eldest son and heir at law, surviving.

Sir John Bennett Piers, upon the death of his father, entered into the possession of the estates comprised in * the * 333

deed of 1794, and so continued till his death. In the year 1803, he became acquainted with Elizabeth Denny, alias King, then an actress at Astley's theatre, in Dublin, whom he removed from the theatre, and who went to live with him, and had by him seven children: Henrietta, born November, 1803; Henry, born October, 1805; John Edward, in October, 1807; W. Stapleton, born November, 1809; George, December, 1810; and the appellants, Louisa and Florence, born respectively the 23d June, 1815, and 17th April, 1819.

It was alleged on the part of the appellants, that while their parents were resident in the Isle of Man, namely, on the 27th of May, 1815, a marriage was solemnized between them in the parish of Kirk Bradden, in that island, by the Reverend T. O. Stewart, an Irish clergyman, then assistant curate of St. George, Douglas, and it was in virtue of this alleged marriage that the appellants claimed, in the character of lawful "younger children," to be entitled to a charge on the respondent's estate, created in their favour by Sir John Bennett Piers, in pursuance of the power reserved to him by the deed of 1794.

The evidence, given by the appellants, as to the marriage was in substance as follows: The Reverend Thomas Orpen Stewart, A. M., was, on the 2d of November, 1810, named domestic chaplain to Dr. Crigan, then bishop of Sodor and Man, and on the 25th of January, 1812, was appointed by the Bishop assistant to the curate of Saint George's Chapel, Douglas. Sir John Bennett Piers lived at a house called Leece Lodge, near Douglas, situate in the parish of Kirk Bradden, but not within the district of Saint

George's Chapel. In the year 1814, the Rev. Dr. Murray *334 succeeded Dr. Crigan, as bishop of Sodor and *Man, and the Rev. T. O. Stewart continued occasionally to perform duties as a clergyman at St. George's Chapel. Previously to the year 1815, Sir J. B. Piers, finding that there was likely to be fresh offspring from his connection with Miss Denny, expressed, in strong terms, his desire to have legitimate children, who could succeed to his estate. Lady Piers, in her deposition, made with regard to this matter the following statement:—

"I am quite certain that my late husband fully contemplated and intended that a marriage between him and me should be solemnized, for a period of more than two years before it took place in the year 1815; and I am also quite certain that he intended to

solemnize a legal and valid marriage, as he frequently expressed to me an anxious wish that I might have issue which would inherit his estates, and that he would make a certain and safe provision for me and my children; and I know that my late husband was desirous that his brother, the Reverend Octavius Piers, who was then residing in England, should perform the ceremony of marrying us; and that his said brother would come to the Isle of Man for that purpose, which he was unable to do, as his wife objected, in consequence of her approaching confinement, and was afterwards delayed, until my late husband became intimately acquainted with the Reverend Thomas Orpen Stewart, who was at that time assistant chaplain at the chapel of Saint George's, Douglas, in the Isle of Man."

It was alleged, that this intended marriage actually took place in the year 1815, being celebrated under a special license, at Leece Lodge, by the Reverend Thomas Orpen Stewart, in the presence of John Edwards, then a captain in the regiment of Ancient Britons. The following certificate was given: "I certify, that I have * this day the 27th May, 1815, in the parish of Bradden, * 335 Isle of Man, celebrated, according to the rights and ceremonies of the church of Great Britain and Ireland, as by law established, a marriage between John Bennett Piers, Baronet, of Tristernagh Abbey, county Westmeath, Ireland, and Elizabeth King, *alias* Denny, spinster. Signed the day and year above.

"T. O. STEWART, Clerk, A.M.

"JOHN B. PIERS, }
 "ELIZABETH PIERS. } In the presence of JOHN EDWARDS."

This document was produced in evidence by the appellants, as proof of the marriage of their parents. It was also argued upon as showing the intentions of the parties. And, for the purpose of proving Sir J. B. Piers's belief that a valid marriage had been celebrated, evidence was given that, immediately afterwards, he executed a will in the following form:—

"I hereby will and bequeath to my wife, Elizabeth Piers, a jointure of 600*l.* per annum, to be paid out of my estates in Westmeath and Longford.

"Witness my hand and seal, May 27th, 1815.

"JOHN B. PIERS.

"Present, T. O. STEWART, JOHN EDWARDS."

In 1821, Sir John and Lady Piers went to reside in Ireland, and then a second marriage was duly solemnized between them. In 1836, Sir John executed, under the powers of the deed of 1794, a charge of 2000*l.*, in favour of each of his two daughters, born subsequently to May, 1815, and by a will, dated 30th of May, 1842, he ratified the appointments of the jointure and charges. Sir J. B. Piers died, in July, 1845, without lawful issue male, and the respondent entered into possession of the settled estates, and took the title.

A bill had been filed against the respondent and others, in * 336 the lifetime of Sir J. B. Piers, praying that *the charges in favour of the appellants might be declared to be established. That bill was dismissed as premature, but without costs, as the then Lord Chancellor (Lord Plunket) was of opinion that the legitimacy of the plaintiffs in that bill (the present appellants) had been unnecessarily and improperly contested, and had been satisfactorily established.¹

Several witnesses were examined in that cause. Sir J. B. Piers had himself been examined, and as to the *fact* of marriage, deposed, "I have looked on the paper writing marked (A), and indorsed my name thereon. It is the certificate of my marriage, dated the 27th of May, 1815; the said certificate and the signature, 'T. O. Stewart, clerk, A. M.,' is the handwriting of the Rev. Thomas Orpen Stewart, since deceased, who performed said marriage ceremony, on said day, between me and Elizabeth King, otherwise Denny, spinster, my present wife. The said Thomas Orpen Stewart was a beneficed clergyman of the established church, and at that time officiated as one of the curates in the parish church of St. George's, Douglas, in the Isle of Man. The said marriage took place at my residence, at Leece Lodge, near Douglas, in the forenoon of said day. Captain John Edwards, formerly of the regiment called the Ancient Britons, was present at and witnessed said marriage. He died in about four or five years afterwards; his name is subscribed as a witness to said marriage certificate, and in his proper handwriting; the signatures John Piers and Elizabeth Piers thereto, are the proper handwritings of me and my said wife; the said Thomas Orpen Stewart informed me and my said wife, at said time, that said marriage was * 337 perfectly valid, which from my own knowledge I * believe

¹ *Piers v. Tuite*, 1 Drury & Walsh, 298.

was perfectly true." He also identified the paper by which, on the same day, he created the charge of 600*l.* a-year for his wife.

Lady Piers, in her examination in this cause, deposed in the same terms as to the marriage, and added that "at the conclusion of the marriage ceremony, the Rev. T. O. Stewart stated to my late husband, in my presence, in answer to an inquiry if all was correct and legal, that the marriage ceremony had been all duly solemnized." Both parties accounted for the marriage being kept secret, by stating that the mother of Sir J. B. Piers was alive in 1815, and that she having absolute control over the greater part of the family estates, he was afraid of offending her by a marriage which she might not consider sufficiently advantageous.

Mrs. Mary Stewart deposed: "I have a very distinct recollection of the day and occasion of the said marriage certificate, viz. the 27th of May, 1815, and I remember very well that my said husband, the late Rev. T. O. Stewart, upon that occasion, left home from his residence at Douglas aforesaid, in the forenoon of the said day, for Leece Lodge, the residence of the said Sir J. B. Piers, for the purpose of solemnizing a marriage between the said Sir J. B. Piers and Elizabeth Denny; and I recollect perfectly well, upon my said husband coming back from Leece Lodge aforesaid, upon the same day, he told me that he had performed the marriage between the said parties; to the best of my recollection and belief it was about the hour of one o'clock in the afternoon when he returned home upon that occasion; and I am quite certain that the marriage ceremony was performed before the hour of twelve o'clock in the forenoon of that day, because I have a distinct recollection of my husband's telling me at the time how

* very anxious the said Sir John Bennett Piers was, that * 338 said marriage should be solemnized within canonical hours; and I recollect his saying at the same time, 'Well, I have just married Sir John to Miss Denny, and I am very glad of it, for it is a pity there should be any slur upon such a mild, amiable, nice person as she is.' " It was proved that the said Mr. Stewart died in Jamaica in 1819, having for two years held the living of St. Dorothy's, in that island.

Miss Margaret Christian, daughter of the late Vicar-General of the Isle of Man, and sister of the Rev. John Christian, curate of St. George's, deposed that the Rev. T. O. Stewart was appointed

to assist her brother in the curacy, "as her brother was too young to perform the whole service himself, he being only in deacon's orders, and there being no other clergyman. I heard a report of Sir J. Piers's marriage with the present Dame Eliz. Piers, which, I believe, must have taken place about 1815." "I never visited the plaintiffs' mother as Lady Piers; I knew her to be styled Lady Piers, and I also knew that Mrs. Stapleton, a lady of most correct conduct, and the wife of General Stapleton, did visit Lady Piers, and was very intimate with her in the Isle of Man."

Upon the question of credit and repute, Mrs. Stewart deposed that, after May, 1815, "I know that the said Sir John B. Piers owned and acknowledged her to be the mother of the complainants in this cause, and his lawful wife, and the said complainants to be his legitimate children, issue of the said marriage; and the said Dame Elizabeth was introduced to his friends, acquaintances, and visitors, as I have always understood, and do believe, as his lawful wife; and immediately after it became a matter of
* 339 notoriety and well known in the * town of Douglas, that they had been married by my said husband as aforesaid."

Sir William Hillary, bart., a justice of the peace in the Isle of Man, deposed: "I was acquainted with the late Sir John Bennett Piers, on or about the 27th of May, 1815, and subsequently thereto I was informed by the Rev. Thomas Orpen Stewart, some time in or about the latter part of the year 1815, that he had married Sir John Piers to Miss Denny; and subsequently I was informed by Sir John Piers, that he deeply regretted that he had not secured the inheritance to his sons of his estates and title, but that he had done every thing in his power to rectify the error by marrying their mother, as," he (Sir John Piers) added, "you have, no doubt, already heard"; and I said, "I had heard that they were so married." "I was in the frequent habit of dining, with other gentlemen, at Sir John Piers's residence, Leece Lodge, and Hampton, subsequently to the 27th of May, 1815, until his departure from the island, and ever after I had been so as aforesaid informed of the marriage of Sir John Piers with Miss Denny, I believed them to be man and wife; they lived together as man and wife, and at various times when I have dined with him, she presided at his table, and I believe their acquaintances generally believed them to be man and wife."

Captain Cæsar Bacon, formerly of the 23d Light Dragoons,

deposed: "I returned to the Isle of Man in the year 1817; I then heard of the marriage of Sir John Bennett Piers with Miss Denny, and from that time they lived together as man and wife, and I considered them to be lawful man and wife."

No entry of any license could be found, nor any register of the marriage. These circumstances were accounted for by the appellants as the consequence of the * great irregularities * 340 which, up to a very recent period, had occurred in matters relating to marriages in the Isle of Man; and much evidence was given to show that marriages, the lawful celebration of which was undoubted, had not been registered, and if celebrated by license, no trace of the license was to be found. One of this latter class was in the case of two marriages of the Hon. Captain Murray, first cousin of the said Dr. Murray, then Bishop of Sodor and Man, and now Bishop of Rochester. The first of those marriages was celebrated in the year 1811, and the second in 1819, but of neither of them was an entry made till 1822, some years after his Lordship had come into possession of the see.

In further evidence of those irregularities and omissions, the Rev. Francis Broderick Hartwell deposed: "I hold the situation of chaplain to the protestant chapel of St. George's, at Douglas, in the Isle of Man, and have held that office nearly eleven years; I held the offices of Vicar-General and Surrogate for the southern part of the Isle of Man, in which the parish of Kirk Bradden is situate, from the year 1832 until the 1st of January, 1846, when I resigned the office of Vicar-General; but I still hold the office of Surrogate for issuing of marriage licenses. I have not the possession of any registry book of marriage licenses granted by the Vicar-General for the time being of said island in the year 1815, or prior, or subsequent thereto; I have no knowledge, nor do I believe that there are, or ever had been any such books of registry of marriage licenses, or affidavits, or bonds grounding same, at all registered by the Vicars-General. I have never known, and I do not believe, that marriage licences in, or previous to the year 1815, or the affidavits or bonds to ground such marriage licenses, were regularly entered in any books of registry, in * or * 341 previous to said year 1815; and when I knew the parties, I have usually dispensed with written bonds or affidavits, but I have always required them to be sworn before me, that they were eligible to be married, and I believe that my predecessors in office

adopted the same practice. I have the custody of the registry books for marriages by special license in the chapel of St. George's, Douglas. I have carefully examined the entries of marriage by special license in said registry book, which amount in number to fifty-nine, and I only find two out of the whole number of fifty-nine licenses recorded or forthcoming."

It was stated in evidence that the practice in the Isle of Man was, to hand the special licenses to the officiating clergyman, who had not been in the habit of depositing them in any office, or taking any care to preserve them.

The Reverend Joseph Qualtrough, Vicar of Kirk Lonan, who was a beneficed clergyman in the island from 1810, deposed: "I do not recollect what became of the original marriage licenses; I do not believe that I returned the special marriage licenses which I received for performing the marriage ceremony, to any public office or registry, but that I kept them probably for some time, and I cannot tell what became of them afterwards."

The Rev. Joseph Brown, episcopal registrar of Sodor and Man, stated that in 1818 he received special directions from the Bishop to take affidavits according to the canons of the church, previously to granting marriage licenses. He afterwards deposed: "I have searched in the ecclesiastical registry of the Isle of Man,

to ascertain whether or not the special marriage licenses, in
 * 342 or previous to the year 1815, or the affidavits or bonds * to
 ground such marriages by special license, were regularly
 or at all entered; but I have not been able to discover any entry
 in such registry, and I cannot state whether or not they have been
 registered elsewhere, in and previous to the year 1815; there is not
 any registry of special marriage licenses, or affidavits or bonds,
 that I know of, since the year 1815. I am unable to state
 whether or not it was the custom of clergymen, celebrating such
 marriage, to destroy the license." He added that affidavits to
 obtain licenses were made by the parties before him, the registrar.
 As to baptisms, he stated that it was a common custom to specify
 in the certificate the Christian and surname of the father of the
 child, and the Christian and maiden name only of the mother,
 without adding her marriage surname.

Lawrence Adamson, law clerk, deposed: "I have inquired, in
 order to search for licenses, bonds, or affidavits, to ground licenses

for marriages. I am quite certain that there is no public registry or office in Douglas for the preservation of licenses, or bonds, or affidavits to ground licenses for marriage. The paper-writing marked (H) purports to be a copy of the entries of marriages by special license in the registry book of St. George's chapel, Douglas, in the Isle of Man; I have compared such copy and list of marriages by special licenses with the original registry book of marriages by special license kept in the chapel of St. George's, in Douglas aforesaid, and it is an accurate list of such marriages by special license appearing therein, and such document is, as nearly as I could make the same, a *fac-simile* of said registry, differing from the same as little as possible, having bestowed great labour thereon. I believe the chapel of Saint George's to be within the parish of Kirk Bradden, and * a chapel of * 343 ease to the parish church of Kirk Bradden; I have made diligent search in the original parish registry books at Kirk Bradden for corresponding entries of those marriages so contained in said list abstracted from the said registry at St. George's chapel, and I only found one entry of the said several marriages duly entered in the parish registry at Kirk Bradden, viz. the entry of the marriage of Francis Matthews and Alicia Forbes, who appear to have been re-married by license on the 12th day of April, 1813, at Kirk Bradden aforesaid; I have examined the registry of the parish church of Kirk Bradden, and there are not any marriages by special license registered therein in the years 1814, 1815, or 1816, respectively. I have examined the book of registry for marriages at St. George's chapel, Douglas, which appears to have been kept down to the year 1816, and find that many of the marriages therein entered are not entered consecutively and regularly, according to their numbers, and the dates and years of such marriages; several of the marriages are entered in wrong places, and there are four entries of marriages in said book purporting to have had only one subscribing witness. I found that after the fourth leaf in the said last-mentioned registry book, that two leaves appeared to have been cut out; and I found after the fifth leaf of said book, that one leaf appeared to have been torn out; and I also found immediately after the said two leaves, so appearing to be cut out as aforesaid, four leaves had been inserted in the said book, and sewn into it with strong thread, and many marriages are entered in such introduced leaves."

For the respondent, defendant in the suit in which the * 344 decree now appealed against was pronounced, it was * contended that there had not been any valid marriage between Sir J. B. Piers and Miss Denny in May, 1815, and in the first instance, the "Act to prevent Clandestine Marriages," passed at the Twynwald Court, held at the Castle Rushen on the 27th of May, 1757,¹ was relied on. Evidence was also given to show that

¹ By which it was enacted, "that no license of marriage shall, from and after the publication of this Act, be granted by the bishop, vicar-general, or other person having authority to grant such licenses, to solemnize any marriage in any other church or chapel than in the parish church of, within or belonging to, such parish in which the usual place of abode of one of the persons to be married shall have been within the space of three months immediately before the granting of such license, and in no other place whatsoever; provided always, that nothing herein contained shall be construed to extend to deprive the bishop and his successors of the right of granting *special licenses to marry at any convenient time or place, so that the said license be under his own proper hand and seal episcopal.*

"And it is hereby enacted, that such licenses for solemnizing marriages shall not be valid unless the same be under the hand and seal of the persons authorised to grant such licenses respectively, and that no such licenses shall be granted to any person whatsoever, but according to the directions of the several ecclesiastical canons of 1603 relating to marriages.

"And whereas many persons do solemnize matrimony without publication of banns or license of marriage first had and obtained as aforesaid, therefore, for prevention thereof, be it enacted by the authority aforesaid, that if any person shall from and after the publication of this Act, solemnize matrimony in any other place within this isle, or the dominion thereof, than in a church where banns have been published, *unless by special license from the bishop as aforesaid,* or shall solemnize marriage without publication of banns, unless license of marriage be first had and obtained from some person or persons having authority to grant the same as aforesaid; every person knowingly and wilfully so offending, and being lawfully convicted thereof, or persons holding any ecclesiastical living, or exercising any ministerial function in the church or chapel of this isle, shall be deemed and adjudged to be guilty of felony, and shall be transported to some of his Majesty's plantations in America for the space of fourteen years; and if such person solemnizing marriage contrary to this act be an alien, foreigner or stranger, and not of the ministry of this isle, and convicted as aforesaid, such alien shall be publicly exposed, with his ears nailed to a pillory, to be erected for that purpose at Castletown Cross, upon the next court day of general gaol delivery after such conviction, at twelve o'clock at noon, and there to remain for the space of one hour, when his ears are to be cut off and remain on the said pillory, and the said offender to be returned to prison in Castle Rushen, there to remain confined till the governor, or his deputy or deputies for the time being, shall think proper to release him, upon paying a fine not exceeding the sum of 50*l.*, and abjuring this isle, and all marriages solemnized from and after the publication of this Act in any other place than a church, *unless by special license as aforesaid,* or that shall

no *such marriage had taken place. The first piece of * 345 evidence was a certified extract from the register of baptism of one of the appellants, who was baptized as the child of "Elizabeth Denny," and not Elizabeth Piers. The extract was in these terms: "Anna Maria Stapleton Florence Fredrica, daughter of Sir John Bennett Piers and Eliza Denny, born 17th April, 1819, and baptized November 24th, 1820."

Other exhibits showed that the registers of the baptisms * of the children of Sir J. B. Piers, born before 1815, had * 346 been in the same form.

For the purpose of discrediting the character and acts of the Rev. T. O. Stewart, who was said to have celebrated this marriage, evidence was given of an action for adultery, commenced by one *R. O. Smith v. The Reverend T. O. Stewart*, in February, 1815, which terminated in October, 1816, by a sentence of divorce *a mensa et thoro*, of Smith from his wife.

A certificate of the marriage of Sir J. B. Piers with "Elizabeth King," at St. Catherine's in Dublin, on the 19th day of March, 1821, was put in evidence. This marriage was celebrated by license, and in both the bond to obtain the license and the *fiat* granted thereon, the lady was described "Elizabeth Piers, otherwise King, otherwise Denny."

The evidence chiefly relied on by the respondent was that of the Right Reverend Dr. Murray, Bishop of Rochester, who deposed: "I do not know any of the parties in the title named. I was Bishop of Sodor and Man previously to my becoming Bishop of Rochester, and I was consecrated at Whitehall chapel, Westminster, in the month of March, 1814, and I continued Bishop of such former diocese until the year 1827, when I was translated to my present diocese. I was not personally acquainted with the late Sir John Bennett Piers, but I knew him by character, and had seen him in the streets of Douglas, in the Isle of Man, in and previous to the year 1815; the said Sir John Bennett Piers was living in said island in that year, and had been a resident there previously thereto, and also, I believe, continued to reside there some years afterwards, but for how long I cannot say. I was resident in said island continuously, from the * month of April, 1814, * 347

be solemnized without publication of banns or license of marriage from a person or persons having authority to grant the same first had and obtained, shall be null and void to all intents and purposes whatsoever."

till the autumn of the year 1816, during the whole of which period I was never absent from said island. I do not know of any marriage having been celebrated between Sir John Bennett Piers and any person, while he was so resident in the said island; and I never heard of any such marriage, or any intended marriage; and I verily believe that no such marriage could have taken place without my knowledge, inasmuch as such an event would have been well known, and talked of in the neighbourhood of Douglas, where I resided; and because, also, the clergyman by whom any such marriage ceremony had been performed would, I have no doubt, have mentioned to me the circumstance, if banns had been called. I never was applied to to grant a special license for the celebration of a marriage between Sir John Bennett Piers and Elizabeth Denny, or Elizabeth King, or any other female, in the year 1815, or at any other time; and I never did grant any such special license to celebrate such marriage; and I have good and particular reason for being certain that I never did grant any such special license, inasmuch as the known characters of the parties would have prevented me from doing so, a special license being an act of favour; and moreover, in order to obtain such special license, Sir John Bennett Piers must have personally appeared before me to take the prescribed oaths, and I am perfectly certain that I never spoke to him or was in the same room with him in the course of my life. It was generally reported and believed, that some female lived and cohabited with the said Sir John Bennett Piers, in the said island, in the year 1815; but whether she so lived with him previously, or subsequently thereto, I cannot

* 348 * set forth. The said female was not, to my knowledge or belief, known or reported to be Lady Piers, or associated with in the said island as such; and I always heard her spoken of as a Miss Denny, and she was generally known by that name. I never heard any reports relating to such cohabitation, save than that the said Miss Denny was at such time supposed to be living with the said Sir John Bennett Piers in a state of concubinage. Special licenses for marriages were granted exclusively by myself during the period that I was Bishop of Sodor and Man; and no such special licenses were ever granted by a Vicar-General, Surrogate, or any other person appointed by me as bishop, in the years 1814 and 1815. It was a usual thing to grant such special licenses for marriages in a private house or place, other than a

church or chapel within the said diocese, and the granting of such licenses is altogether discretionary. I am positively certain that I never did, and also that no person by my authority ever did, grant any special license to marry the said Sir John Bennett Piers to the said Elizabeth Denny, otherwise King, at Leece Lodge, or any other private house in the said Isle of Man; and in addition to the reasons already given by me for being certain that I never did grant any such special license, I have to add, that I should naturally have stated the fact of my having so done, on the occasions of my hearing her (as I did subsequently for many years) always spoken of as Miss Denny, and never as Lady Piers. The steps usual and necessary to be taken previously to granting such special marriage license in the said Isle of Man, during the time that I was bishop of that place, were, for the gentleman going to be married to appear before me, together with * two bonds- * 349 men, and previously to granting such special licenses, the gentleman was required to make an affidavit or oath that there was no legal bar or impediment to such marriage, and no such special licenses were ever granted without requiring such oath or affidavit. I do not now recollect the express form of such special license, nor can I set forth whether or not it contains any injunction or clause respecting the registry of such marriage. I was acquainted with the Reverend Thomas Orpen Stewart, and so knew him in and previous to the year 1815. The said Reverend Thomas Orpen Stewart was not a person of respectable character, and in consequence of his having been a convicted defendant in an action for damages brought against him for criminal conversation, I prohibited him from officiating in said diocese or island; but save than, as aforesaid, I knew nothing of the said Thomas Orpen Stewart, or his character and conduct, he having been merely a casual resident in said island, and I believe that he left said island in consequence of his having been convicted of the offence aforesaid."

Several witnesses deposed that they knew of Sir J. B. Piers and Elizabeth Denny or King living together, but did not know that they were ever married. One of these witnesses, however, admitted on cross examination that, in the year 1815, the servants at Leece Lodge told him that Sir J. B. Piers and Miss Denny had been married the day before, and married by Mr. Stewart, but he did not believe it to be true.

The cause was heard in the Court of Chancery, in Ireland, on the 22d, 23d, and 26th days of April, 1847, and the Lord Chancellor offered — provided the Bishop of Rochester would * 350 come to Ireland for the * purpose of being examined — to grant an issue to try whether any special license was granted for the solemnization of the alleged marriage of 27th of May, 1815, under the hand and episcopal seal of the then Bishop of Sodor and Man. This offer could not be accepted on the part of the appellants without the Bishop's consent to pass over to Ireland, which after a letter of request had been written to him, he refused to do, and the decree was, therefore, made on the 10th of May, 1847, dismissing the bill, without costs.¹

The appeal was brought against that decree.

Mr. Bethell and *Mr. Glasse* for the appellants: —

The question raised here is as to the validity of a marriage celebrated in the Isle of Man. The appellants submit that that marriage is valid both in law and in fact.

The marriage is valid in law on the ground of legal presumption. There are three presumptions of law, all of which are here in favour of the appellants. The first is, *Semper præsumitur pro matrimonio*: this is a presumption of law. The next is, that every intendment shall be made in favour of a marriage *de facto*; so that if any clergyman was present performing the ceremony, the law will presume that he was a clergyman properly authorised. The third is, that where an act appears to have been performed by proper persons, the law will intend that every thing was done in a proper manner. The burden of impeaching this marriage lies therefore on the respondent.

The extent and effect of these legal presumptions were not adverted to in the Court below, and hence the error into which that Court has fallen. The force of a legal presumption, especial-

* 351 ly in the case of marriage, * and of legitimacy of children, is complete, unless it is absolutely rebutted by proof; *St. Devereux v. Much Dew Church*.² In *May v. May*,³ the presumption of fact in favour of marriage was allowed to prevail against a recital of a private Act of Parliament, founded on the oath of one of the parties. In *Wilkinson v. Payne*,⁴ the jury having found a verdict on a

¹ 10 Irish Eq. Rep. 341.

² 1 W. Blackstone, 367.

³ Buller N. P. 112.

⁴ 4 Term Rep. 468.

presumption of a legal marriage, the Court would not afterwards disturb that verdict, though there was actually evidence to show that that presumption was unfounded. In *Steadman v. Powell*,¹ probate of a will was refused to a person who claimed to be executor to a female, such female having been a married woman, and the Ecclesiastical Court there held the marriage to be proved by circumstantial evidence alone. In like manner the Court of Common Pleas, in *Doe d. Fleming v. Fleming*,² held reputation to be good evidence of marriage, though the party adducing it as evidence sought to recover property as heir at law, and his father and mother were still living. And the Ecclesiastical Court, first by a decision at the Peculiars, and then on appeal before the Delegates, held, in *Smith v. Huson*,³ that a marriage of a minor by license, though there was only the implied consent of the father, was good.

This rule of presumption is strongest in favour of the validity of marriage, but it also extends to other matters. Thus, where the law requires a particular act to be done by a particular person, and the omission of it would make him guilty of a criminal neglect of duty, the law will presume that he has done it, and * will throw the burden of proving the negative on the * 352 other side; *Williams v. The East India Company*.⁴ There notice to the captain, by the charterers, of having put on board a ship a dangerous commodity was presumed, and the burden of proving that there had been no notice was held to lie upon him. That application of the rule of presumption is important as to another part of this case, for it is clear that, had the clergyman who celebrated this marriage, wilfully violated the provisions of the Marriage Act of the Isle of Man, the provisions of which he was bound, not only as a resident, but still more as a clergyman, to know, he would have subjected himself to very severe penalties. This doctrine of presumption was applied in the case of *The King v. Twynning*,⁵ in favour of the valid marriage of one party, not only because of the presumption in favour of marriage, but also on account of the presumption against the committing of a crime. This last case was recognised, and not overruled, in *The King v. Harborne*;⁶ and all these authorities, together with that of *Cunning-*

¹ 1 Addams, 58.³ 3 East, 192.² 4 Bingham, 266.² 2 Barnewall & Alderson, 386.³ 1 Phillimore, 287.⁶ 2 Adolphus & Ellis, 540; 1 Harrison & Wollaston, 36.

hams v. Cunninghams,¹ were brought under the attention of this House, and admitted in the case of *Lapsley v. Grierson*.²

Assuming, then, the rule as to the presumption of law in favour of the validity of a marriage, and against the committing of a crime, to be established, the question here turns upon the application of that rule to the circumstances of the present case. The parties impeaching the marriage, having the burden of proof thrown on them, rely on the testimony of the Bishop of *353 Rochester, *who, in 1815, was the Bishop of Sodor and Man. It is submitted that that testimony is quite inconclusive for such a purpose. In the first place, the event was a distant one; and throughout his evidence the Bishop speaks of what was done, not with the positiveness of a clear and undoubting recollection, but with a belief founded on reasons of probability and convenience. These reasons are not in themselves satisfactory, and some of the supposed facts which constitute some of the reasons, or which are the foundations for others, turn out to be mistaken. Thus it is clear that parties requiring a special license might not appear personally before the bishop; they might go, and, according to the Rev. J. Brown's testimony, appear, as a matter of course, to have gone before him, and not before the bishop for a license. Besides this, a license, either on personal application to the Bishop, or on the ordinary application to the registrar, might be granted and acted on, and a regular marriage take place, and yet no entry of it, or no entry of it at the proper time, be found in the register. The marriages of the Bishop's nephew, Mr. Murray, were instances of this sort, and furnish another argument in favour of the appellants; for not only were there regular licenses in those cases, and not only did regular marriages take place, but the first of those licenses was granted by Dr. Crigan, the predecessor of Dr. Murray, in 1811, and yet no entry of the marriages appeared until some years after Dr. Murray had held the see, namely, in 1822. The license, in the case of Sir John Piers, might have been in like manner granted by Bishop Crigan, and probably was so granted at the time when Sir John Piers's brother was expected to perform the ceremony. If so, it would not be used at the *354 moment *because the brother did not come; but it would

¹ 2 Dow, 482.

² 1 House of Lords Cases, 498. See *The Breadalbane Case*, Law Rep. 1 H. L. Sc. 182, 212; *Longworth or Yelverton v. Yelverton*, Law Rep. 1 H. L. Sc. 218, 230.

be used afterwards, and would constitute a valid authority for celebrating the marriage. The maxim *Omnia rite acta*, is in support of this supposition; for it cannot be imagined that a clergyman who, like Mr. Stewart, knew the law of the island, would, without any interest to influence him, expose himself to penalties for violating it. It must be presumed that he, being a properly authorised person to celebrate a marriage, celebrated this marriage upon proper authority, and in regular form.

The fact of a formal marriage in 1821 between these parties by no means impeaches the validity of the marriage in 1815. It is in evidence that Sir John B. Piers desired to conceal his marriage from his mother, from whom he had expectancies, and the second marriage was nothing but a public re-assertion of the parties' intention, which had lawfully been carried into effect some years before. Nor is the circumstance of the lady being described in the certificate of that marriage, and signing it, in her maiden name at all material.

[LORD CAMPBELL. — There is nothing in that. Lord Eldon was married a second time. The second marriage took place in Newcastle; and though there was no doubt that he had been validly married in Scotland, yet his wife used her maiden name on this second marriage.¹

THE LORD CHANCELLOR. — In cases when a ward of Court has been married clandestinely, the Court always directs a second marriage; and in such marriages the maiden name of the lady is always used.]

By a similar reason, the use of the maiden name of Lady Piers in the certificate of baptism of one of the * children * 355 in November, 1820, is accounted for. It was a frequent practice in the island to describe the mother by her maiden name,

¹ The following is extracted from the parish register of Saint Nicholas, Newcastle: "John Scott and Elizabeth Surtees, a minor, with the consent of her father, Aubone Surtees, Esq., and both of this parish, were married in this church by license, the 19th day of January, 1773, by me,

"CUTH. WILSON, Curate.

"This marriage was solemnized between us,

"JOHN SCOTT,

"ELIZABETH SURTEES.

"In the presence of us,

"AUBONE SURTEES.

HENRY SCOTT."

Lord Campbell's Lives of the Chancellors, Vol. VII. p. 34.

and such description did not in any manner affect the question of her marriage, or even show that a doubt was entertained upon the subject of it.

Mr. J. Parker and Mr. F. Goldsmidt. — The respondent is willing to take on himself the burden, which, according to the doctrine of the other side, is cast upon him, of showing that there was no valid marriage of Sir J. B. Piers and the mother of these appellants in the year 1815. He admits that he must show that there was a high degree of probability that there was no license authorising this marriage. The Court below proceeded on the assumption that the duty of impeaching this marriage lay with the respondent; and he, having completely and satisfactorily discharged that duty, Lord Chancellor Brady gave judgment in his favour. That judgment is right both in law and in fact.

It has been said that the effect of the law of presumption was not properly considered in the Court below; but there is nothing to support that argument. The case of *Lapsley v. Grierson*¹ is an authority for the respondent, for it shows that presumption
 * 356 may be * rebutted by evidence, — a rule which had, years before, been acted on by the Court of Queen's Bench, in the case of *The King v. Harborne*,² where it was held that the weight that was to be attached to a presumption of fact was to be regulated by the facts of each particular case. The decision of that case in favour of the validity of the first marriage was in consequence of the weight of evidence there most favouring such a conclusion, and Lord Denman expressly denied that there was any such rigid presumption of law as that now contended for.

[LORD CAMPBELL. — That was as to the presumption of life or death. But that does not affect the presumption of law that when a properly qualified person does an act within the limits of his authority, the presumption, *omnia rite acta*, is to be applied. We are bound to presume here that there was a license. It is true that that presumption may be rebutted; but it must be by very strong evidence.

THE LORD CHANCELLOR. — We can see what presumption the Court below had in consideration; for the issue proposed by the Court was whether the Bishop of Rochester had granted a license.]

¹ 1 House of Lords Cases, 498.

² 2 Adolphus & Ellis, 540; 1 Harrison & Wollaston, 36.

In *The Banbury Peerage Case*, the Judges gave answers to certain questions which very exactly ascertain the limits of this doctrine of presumption upon the question of the legitimacy of a child. Those answers are to be found in a note to a report of a case of *Morris v. Davies*,¹ which occurred in this House. From those answers, and from that case itself, the rule of presumption appears to be this, that the presumption of * legitimacy * 357 from the birth of a child in lawful wedlock may be rebutted not only by proof of non-access, but of such circumstances, even where the husband and wife are in the same house, as tend to disprove any sexual intercourse having taken place between them. Surely the presumption in favour of the celebration of a marriage cannot be stronger than the presumption of the legitimacy of a child, born in lawful wedlock. The same reasons in favour of the application of the doctrine of presumption exist in both cases, but more directly in the latter than in the former. In *Head v. Head*,² Lord Eldon said, "where there is personal access under such circumstances that there might be sexual intercourse, the law raises the presumption that there has been actually sexual intercourse, and this presumption must stand till it is repelled satisfactorily by evidence that there was not such sexual intercourse." What that satisfactory evidence is, he goes on in that case to show, and it amounts to no more than that which the respondent has offered here. The respondent is entitled to succeed if, on the evidence, he can satisfy the House that it was in a high degree more probable that there was not a license, than that there was one. Such was the doctrine adopted by this House in the case of *Morris v. Davies*.³

[LORD CAMPBELL. — In considering that case, it must be remarked that the birth of the child was concealed from the husband.]

But independently of the particular facts of that case, the Lord Chancellor there lays down the rule that the presumption of law may be rebutted by circumstances, and especially speaks⁴ of "Evidence diminishing * the probability or showing the * 358 improbability that such intercourse did in fact take place."

The case of *Wilkinson v. Payne*⁵ can hardly be said to affect the

¹ 5 Clark & Finnelly, 163; see p. 229 note.

⁴ 5 Clark & Finnelly, at p. 242.

² Turner & Russell, 138, 141.

⁵ 4 Term Rep. 468.

³ 5 Clark & Finnelly, 163.

present, for there the jury having found a verdict on the facts, the Court would not, on a mere presumption, set aside that verdict, when the parties were clearly entitled in equity and justice to recover. Again, in *Williams v. The East India Company*¹ the plaintiff was merely nonsuited, because he did not produce the best evidence in support of a material allegation in his declaration, namely, that the servants of the Company knew of the dangerous nature of the material they put on board the plaintiff's vessel. Here the case could not fail on that ground. The case of *The King v. Twynning*² was questioned in *The King v. Harborne*,³ where it was expressly denied that there was such a rigid presumption of law as that which is now asserted.

On the other hand, it is clear that when a marriage has been questioned in the Ecclesiastical Court on the grounds of non-compliance with the statute in the publication of banns, that Court has decided on the balance of evidence, and not on any mere doctrine of legal presumption; *Frankland v. Nicholson*,⁴ *Pougett v. Tomkyns*,⁵ and *Mather v. Ney*.⁶ The Court of Exchequer in Equity, too, has adopted the same course of proceeding, in a case where the validity of a marriage by license was in * 359 question; *Poole v. Poole*.⁷ And * finally, this House, on a claim of peerage, expressly recognised the rule as laid down in *Morris v. Davies*,⁸ of admitting presumption in such matters to be rebutted by proof, and decided the claim on the ground that the proof there given was sufficient to establish a case of illegitimacy; *The Barony of Saye and Sele*.⁹

It is therefore submitted that the judgment of the Court below in this case was right. In the first place, there is no such absolute presumption of law as to exclude evidence; and in the next, evidence being admitted, that evidence was conclusive against the validity of the pretended marriage. What was that evidence? It was in substance this, that there was no trace of the grant of any license; that there was no entry of any solemnization of marriage under any license; that the Bishop of Rochester had been Bishop of the island for a year before the pretended marriage took

¹ 3 East, 192.

² 2 Barnewell & Alderson, 386.

³ 1 Harrison & Wollaston, 36; 2 Adolphus & Ellis, 540.

⁴ 3 Maule & Selwyn, 259 note.

⁷ Younge, 331.

⁵ 3 Maule & Selwyn, 262 note.

⁵ 5 Clark & Finnely, 163.

⁶ 3 Maule & Selwyn, 65 note.

⁹ 1 House of Lords Cases, 507.

place, and had not granted any such license, but would, on account of the known character of the parties, have refused it if applied for. Then come the facts of the misconduct of the person who is said to have solemnized the marriage; the absence of any general recognition of the parties as married; the baptism of one of the appellants, with the name of "Denny" given as that of her mother; and, lastly, the formal marriage of these parties in Dublin in 1821. No one of these facts might be conclusive against the alleged marriage of 1815, but the whole of them, taken together, render it impossible to believe that any such marriage took place. The decree of the Court below must consequently be affirmed.

Mr. Bethell, in reply. — The fallacy of the argument on the other side is, that the *præsumptio legis vel facti* * and * 360 the *præsumptio juris* are confounded together. The one may certainly be rebutted by evidence; for it is in truth nothing but a conflict of presumptions. But the other, which flows from facts already established, cannot be rebutted. The rule of the civil law, which has been everywhere adopted, is well expressed in the Digest, "*Estque nihil aliud quam dispositio legis præsumptis, et super præsumpto tanquam sibi comperto statuentis; contra quam non admittitur probatio.*"¹

[LORD BROUGHAM. — And in pleading, the *præsumptio juris* can never be traversed.]

That is so. In the present case, the facts are established, and the *præsumptio juris* applies. The authority of *The King v. Twynning* was not impeached in *The King v. Harborne*, so far as the rule of law was concerned; but it was held not to apply with all its force to that particular case. The language of Lord Denman related only to a presumption of the fact of the continuance of life, in that case, being liable to be considered with reference to the weight of evidence in its favour and against it. That is a mere balance of presumptions, and it was so considered in this House in the case of *Lapsley v. Grierson*.²

This case has not been properly tried; and the two conclusions of the Court below are wrong. The decree ought to be reversed, and the legitimacy of the appellants declared.

¹ Dig. Bk. XXII. Tit. III. "De Probationibus et Præsumptionibus."

² 1 House of Lords Cases, 498.

March 22.

THE LORD CHANCELLOR. — This is an appeal from the decision of the Lord Chancellor of Ireland, upon the adjudication to * 361 which * he has come, as to the legal validity of the marriage upon which the legitimacy, and therefore the rights of the appellants, depended. It appears that the Lord Chancellor ultimately decided that point on the evidence before him, but he, at the same time, offered an issue, which he thought would try the question of the validity of the marriage. The issue which he offered to the parties was, “whether there had been a special license from the Bishop of Sodor and Man, authorising the clergyman of that island to celebrate the marriage.”

Now it does appear to me that the issue so tendered goes very much to explain the ground upon which the Lord Chancellor decided the case, because it shows that according to the view which he took of it, the question in dispute depended upon the greater or less weight of the evidence upon the one side or the other; otherwise the issue would not reach the question so as to decide upon the validity of the marriage. Such an issue would rest upon the balance of evidence as to a particular fact, upon the result of which the validity of the marriage undoubtedly would depend; but that is not the mode in which the law contemplates matters of proof relating to the lawfulness of a marriage. It entirely lays aside all that strong legal presumption upon which the law proceeds in the case of marriage, and adjudicates upon the point as upon any other matter of fact, with respect to which there is no presumption one way or the other, but where, upon the result of the investigation as to the existence of the fact, the right of the parties might depend.

My Lords, I have not found that the rule of law is anywhere laid down more to my satisfaction than it is by Lord Lynd- * 362 hurst in the case of *Morris v. Davies*, * as determined in this House.¹ It is not precisely the same presumption as exists in the present case; but the principle is strictly applicable to the presumption which we are considering. He says:² “The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct,

¹ 5 Clark & Fennelly, 163.² See p. 265.

satisfactory, and conclusive." No doubt, every case must vary as to how far the evidence may be considered as "satisfactory and conclusive"; but he lays down this rule that the presumption must prevail unless it is most satisfactorily repelled by the evidence in the cause appearing conclusive to those who have to decide upon that question.

Now, my Lords, here the legitimacy of the plaintiffs, which is the question in the cause, depends upon the validity of a marriage celebrated in the Isle of Man by a clergyman whose *status* is not a matter in dispute, he having been a regularly ordained clergyman, doing duty in a church there, and as to whose capacity to celebrate marriage there is no dispute. The question arises as to whether the marriage so celebrated was valid according to the law of the Isle of Man, requiring the special license of the bishop in cases where the marriage is celebrated, as this was, in a private house, and not in a church.

Of the fact of the marriage there is no dispute whatever; there is not even a question raised about that. But not only is the fact of the marriage proved, but it is proved to my entire satisfaction that the clergyman and the parties to the marriage were all anxious that a valid marriage should be celebrated, and all supposed that a valid marriage had been celebrated. It is in * evidence that Sir John Piers — the lady whom he mar- * 363 ried being at that time near the period of her confinement — was anxious to have a child born who might be the heir to his property. There is no doubt that the woman, at all events, must have been anxious for a valid marriage. The clergyman not only must have been anxious not to incur the penalties which the law imposes upon clergymen celebrating marriages otherwise than according to the law of the island, but the evidence shows that he could not possibly have been in that situation, in which he is attempted to be described in the cause, namely, that of a person ignorant of the law, and therefore likely to err, as not knowing what the law of the island was. He not only was a clergyman who had been for a considerable time exercising the functions of a clergyman of one of the churches in the island, but he had been the private or domestic chaplain, as it is called, of the preceding Bishop of Sodor and Man; and he, it appears, had also been previously engaged in celebrating marriages of this description. We therefore have it for certain, that all the

parties must have intended that a valid marriage should be celebrated; and that at least one of the parties understood the law relating to the marriage which he was celebrating.

Then we have the subsequent conduct of the parties, proving beyond all question that they supposed that a valid marriage had been celebrated. The children are treated as legitimate children; the wife is treated as the lawful wife; and the conduct of the parties, from beginning to end, shows that they believed a valid marriage to have been solemnized. This is not at all shaken by the fact of a subsequent marriage having taken place in Ireland. We know that that does frequently happen without the slightest imputation on the validity of the first marriage.

*364 *Now, under these circumstances, the validity of the marriage is impeached upon this ground, that there is no proof of there having been a special license granted by the bishop. Then we have a marriage unimpeached by any circumstances to show the knowledge of the parties, or the opinion of the parties, that other than a valid marriage had been celebrated, accompanied by the anxious wish that such marriage should be celebrated — and we have a clergyman engaged in celebrating the marriage, who must be supposed to have been cognizant of the law of the island; he appears to have been so; and, in point of fact, from his position there can be no room for doubt as to whether he was or was not cognizant of the law of the island; and opposed to these circumstances is the absence of proof of the license under which the marriage was celebrated.

Then here is a case which raises all the presumptions the law can raise in favour of a valid marriage. There is nothing to shake it but this — Was there or was there not a special license? Now, that that may be matter to be inquired into, I do not at all deny. It might be possible to disprove, even at this distance of time, some circumstances upon which the validity of the marriage might depend; but, if disproof was offered, it must be met with all that strength of legal presumption which would operate in favour of the marriage being valid.

Of what then does the evidence consist? — It consists of the testimony of the bishop, who can only speak to his not recollecting having granted a special license. He states reasons why he has confidence in his belief that there was no special license. If the opinion which he has given is maintained altogether by those

reasons, his conclusion from those reasons is hardly entitled to * more weight than the conclusion which your Lordships * 365 yourselves may draw. It does not appear that he gives any other reason for coming to that conclusion, except that he has no recollection of having granted a special license, and that, from certain circumstances, he thinks it very improbable that he should have granted it.

Those reasons, when examined, beyond all doubt do not appear to be very satisfactory. Some of the facts upon which he proceeds, if not entirely displaced, are very much shaken by evidence in the cause; as, for instance, that a party wishing to obtain a special license must appear before the bishop personally, and inform him of the fact. We have very good evidence from Mr. Brown — who held an official situation which must have brought to him a knowledge of the usual practice — from which it is to be inferred that that is not the universal practice. It certainly would be rather an extraordinary practice in matters of that description, which are matters very much of course, and are usually transacted by officers authorised for that purpose, and not by the bishop himself. For instance, Mr. Brown says, that in the year 1818 (it is true that that is after the marriage in question), he received certain directions from the bishop as to the course to be pursued upon application for a special license. From that, one would infer that the bishop, in the ordinary course, permitted that part of his duty to be exercised by his lawfully constituted officer, and did not himself personally interfere in the details of all those transactions.

But, however, giving all the weight to the bishop's testimony which can possibly be asked by those who rely upon the effect of it, it comes to no more than this, — * a mere nega- * 366 tive, — a mere absence of recollection of a transaction which took place thirty years ago, with certain grounds stated, upon which, either in the whole or in great part, that conclusion, to which the bishop has come, has rested. I cannot say that that is evidence, in the language of Lord Lyndhurst, “ strong, distinct, satisfactory, and conclusive.” It appears to me to be the very contrary of what we understand by the meaning of those words.

But independently of that, there is not only evidence of possibility, but of probability, entirely outweighing the probability of the marriage having been celebrated without a special license, in

the fact that the preceding bishop may have granted such a license. There is nothing whatever at variance with that, except the period which elapsed between the time when the special license is supposed to have been granted, and the time when the marriage was celebrated. But there is evidence that it is not at all an unusual thing for a considerable time to elapse between the one and the other. And we have this in proof, that the marriage was contemplated two years before—the brother of Sir John Piers was intended to be the clergyman to officiate. He was not able, however, to come to the Isle of Man, and the postponement took place on that account. We have therefore the fact of the intention having existed at the period at which, if the license was granted by the preceding bishop, the license in question would have been so granted. That is not a fact upon which we can rely as conclusive, but it undoubtedly removes a great deal of the alleged improbability of the license having been granted at a period so long antecedent to the time of the marriage.

* 367 * But, my Lords, I will not go into all the circumstances in detail, simply because the view which I take of this case does not depend upon such an examination of them, but it depends upon this: there is a strong legal presumption in favour of the validity of the marriage, particularly after the great length of time which has elapsed since its celebration, which is not met in this case by that species of positive, distinct, and satisfactory disproof which is essential in order to get rid of the probability of the marriage having been duly celebrated.

Under these circumstances therefore, I cannot come to the conclusion to which the Lord Chancellor of Ireland has come, either as to the result, namely, dismissing the plaintiff's bill upon the ground that they had not made out their title as legitimate children, or still less as to the form in which he proposed to try the issue upon the validity of this marriage. I really have no difficulty whatever on this part of the case. It never appeared to me that there was made out that species of contradiction of the legal presumption, which would justify any Court in coming to a conclusion against the validity of the marriage. The only doubt which I had was as to the course which a Court of Equity ought to have adopted for the purpose of disposing of the question.

Beyond all doubt, my Lords, in an ordinary case in which a question arises as to the legitimacy of children, or the validity of a

marriage, it would be a case for a Court of Equity to send to trial. But there are peculiar circumstances in this case, which, after some consideration, I am satisfied make it the duty of this House not to adopt that course. In the first place, it is hardly possible to adopt that course in a mode * which would lead * 368 to a satisfactory conclusion. It is not a case in which a Court of Equity is bound to do it. It would only do it in the ordinary course of administering its jurisdiction in order to satisfy itself as to the fact upon which the issue would be directed. If the marriage is disproved, there can be no issue directed. Here then the question is, whether the facts are such as, in the discretion of the Court, make it the duty of the Court to direct an issue to be tried by a jury. First of all, it does not depend in any great degree, as we see now from the evidence produced before the Court of Chancery, upon parol testimony; it depends more than any thing else upon the effect and validity to be given to the legal presumption. It is not that kind of case which is peculiarly to be investigated before a jury by parol testimony, the aid of which a Court of Equity requires in ascertaining a disputed fact.

But there is another great difficulty. If this issue is to be directed, it will be directed to be tried in Ireland. Now it does so happen, that the evidence upon which the fact is to depend seems to be found anywhere but in Ireland. Part of it, and a most important part on one side of the question, is to be found in this country—that of the Bishop. Now the Bishop of Rochester is residing here, and he has, as it appears, declined to go to Dublin for the purpose of giving his testimony there. But the other part of the evidence, and perhaps next to that of the Bishop, the most important part of the evidence, is to be found in the Isle of Man. So that you would have the jury in Ireland, but you would have no evidence in Ireland; besides which, if evidence could be obtained, the trial by jury would not in this case be a satisfactory mode of investigating the fact.

* Another ground which appears to me to be conclusive * 369 as to the course which this House ought to adopt is this: the question depends a good deal upon the effect to be given to the legal presumption, as opposed to the description of evidence which we have here. If a jury should come to the conclusion to which the Lord Chancellor of Ireland has come, namely, that the evidence is sufficient to repel the legal presumption, and that fact

should be brought before this House in proper form, could this House be satisfied with such a verdict proceeding upon these grounds? I think it could not, and I believe therefore that an attempt to try the question by an issue would lead to great and unnecessary expense; and that we should by no means come, in all probability, to a more satisfactory result upon the real merits of the case than we may come to on the evidence we have now before us.

My opinion therefore being that the strong legal presumption is not repelled by the evidence in the cause, my advice to your Lordships is to reverse the decree of the Lord Chancellor of Ireland, and to declare that the appellants have established their *status*. That decree upon the finding is quite of course. There will be no reason for sending it back to the Court of Chancery. If there should be any thing else to be adjudicated upon, I apprehend that this House will not decide it, but in that case will remit it to the Court of Chancery for the purpose of having that matter disposed of there. As far as I have been able to see into the cause, there is no defence set up against the claim of the appellants, except the question of whether they are legitimate children, and entitled to the property. If that is so, this House will not be departing from its ordinary course in making a decree in favour of the appellants.

LORD BROUGHAM. — My Lords — I am altogether of the same opinion, and for the same reasons. I consider the rule of law to have been very clearly laid down in *Morris v. Davies*,¹ by my noble and learned friend, Lord Lyndhurst. My noble and learned friend there laid down that rule in very plain terms; and if I had any doubt as to any one of the four descriptions which he gave of the evidence required to rebut the legal presumption of legitimacy, it is as to the last. I should say, “clear, distinct, and satisfactory evidence.” I am not quite prepared to use the word “conclusive.” I think some doubt may arise upon that, which it is unnecessary to raise, because if the evidence required be clear and satisfactory, that is quite sufficient for me. I do not like ever to lay down the rule that evidence must be “conclusive,” because that gives occasion very frequently to needless and inconvenient doubt.

¹ 5 Clark & Finnelly, 163, 265.

Have we, then, in this marriage ; alleged to have been had 35 years ago in the Isle of Man ; always acknowledged to have been intended by the parties for a considerable time before the fact ; acknowledged to have been satisfactory to the parties to a certain extent immediately after the fact ; recognised by them, and by their acts and deeds at the very time, and subsisting till brought into dispute by two circumstances, the one a matter of fact, namely, an unquestioned marriage solemnized in 1821, the other, the proceeding in question to get rid of the charge of 4000*l.* upon the estate ; * always acknowledged to have been a * 371 sufficient marriage except in those two instances, and until those two periods ; have we, I say, sufficiently “strong, distinct, and satisfactory” evidence to repel the legal presumption in accordance with that course of action and acknowledgment ?

I say nothing of what took place in 1821, for I am entirely of opinion that that is no argument whatever against the parties believing that they had contracted and solemnized a legal and valid marriage in 1815. It is a constant course with persons who solemnize irregular marriages, which, though irregular, are perfectly valid and perfectly legal, and against which nothing either of presumption or of law can be alleged ; it is a constant course for them afterwards, needlessly, superfluously, and, in my opinion, irregularly, to solemnize what is termed a regular marriage, *in facie ecclesiæ*. I say “irregularly,” for an obvious reason ; because, if the first marriage is valid, the second marriage becomes an irregular marriage. The first marriage was irregular for want of certain ecclesiastical or legal solemnities ; but in law it was valid. The second marriage is a mockery ; because, for two persons who are single to marry is intelligible, but for two persons who are already married to marry is mockery, and I may almost say a profanation of a very solemn rite of the church. Therefore, though I do not consider that that acting of theirs is at all to be commended, yet it is constantly had recourse to. It is a constant course for persons in a certain station of life, who make what is commonly called a runaway or irregular marriage, afterwards to marry *in facie ecclesiæ*, for the purpose of quieting the scruples of persons of nice conscience, but also for the purpose of putting down any public clamour that may * have arisen. In * 372 England, where the law is so different from the Scotch law, it is a very common thing ; for the public here do not know that

the Scotch law requires no proclamation of banns, no license, and no consent of parents or guardians, to solemnize a marriage. They do not know these things ; and, therefore, they say, " Oh, these people have only been married at Gretna Green, and it is not a valid marriage." In order to meet that public clamour about the fancied illegality and invalidity of the marriage, persons very naturally, but, as I said before, very irregularly, and not commendably therefore, in my opinion, marry again in the Established Church. The same parties would be excessively annoyed and very indignant if you were to tell them that the second marriage was necessary, for they would say, " Why, we have cohabited a week before ; were we living in concubinage at the time ? " They would be excessively angry if you were to tell them that. I have seen the experiment tried in the families of those persons who were the fruits of such a marriage, and they did not at all like it ; but, nevertheless, they were the very first people, I have observed, to complain of others as having been married at Gretna Green, and to say, " Oh, yes, but our fathers and mothers were married in certain churches in England." My answer to that always was, " but if the second was a necessary marriage, in what position were your father and mother previously to that solemnization taking place in that church ? " And that generally brought the matter to an issue, and put an end to the clamour. However, the existence of those feelings in the public mind upon so very delicate a matter in valuing character, and especially female character, is quite sufficient to account for the marriage in 1821 in this case, and to take away all pre-

* 373 sumption, * which might thence arise, of the parties not believing themselves to have been married in the Isle of Man ; not, perhaps, that that of itself would be decisive as the cause of the subsequent marriage, but still it is a strong circumstance.

It appears to me, therefore, that we may take this to be a marriage not questioned till these proceedings took place, and, therefore, the presumption of law, both as to marriage and legitimacy is, in the words of Lord Lyndhurst, only to be rebutted by " strong and satisfactory evidence." Have we that in this case ? — Certainly not. I entirely agree with my noble and learned friend that, from the way in which the issue was tendered, we can quite see what it was which misled the very learned and excellent Judge

in the Court below. To send the question of the legitimacy of the marriage to be decided, not upon the whole case, as it ought to be, not upon the whole matter, but to be decided upon one point, to make that one supposed circumstance of fact, the pivot upon which the whole is to turn, is, to my mind, a monstrous error in the Court below — it is an error which cannot be exceeded, because it is a total confounding of two perfectly different things. It would not be much better than to do this: We say that a parson in a tithe suit has a right to an issue — we say that an heir at law has a right to an issue — we say that — but did any body ever, in sending an issue upon a tithe suit, which the parson has a right to have against the man setting up a *modus*, did any body ever, in sending an issue, which the heir at law has a right in like manner to have, think of making it depend upon a particular fact, not upon the whole question, whether a right to tithes is established, or a *modus* is established or not, upon the whole fact of heir or not ; but upon *some question in the *374 one case, of whether A. B. was churchwarden at the particular time when the terrier was made, or whether a particular fact took place which tended to show that A. B. was heir at law to C. D. or no? No such thing was ever heard — the whole matter is sent to be tried. But it is worse here, because there you have the mere fact in question, and I could much more easily tolerate an order directing an issue, though it would be a most erroneous direction, to try one special circumstance of fact in those two cases that I put, than I could tolerate this issue which has been proposed to be directed here, because this issue is not the thing in question. The thing in question is the validity of the marriage — the thing in question is rebutting or not the presumption of law in favour of the marriage — that is the question ; and the issue proposed would have been an issue trying one fact among many in the case ; and this appears to me perfectly erroneous, and a total miscarriage as far as it goes, but a miscarriage fatal to the whole judgment, for it goes to affect the whole.

There is in this case a very peculiar circumstance. No doubt much, if not the whole, depends upon the fact of the license — whether there was a license or not. It is most important to consider who it was that celebrated this marriage — it is a fact which really does dispose of the question in my opinion. It is celebrated by a person in orders, and who had been for some time in orders,

in the Isle of Man. It is celebrated by a person who could not by possibility be ignorant of the law of the Isle of Man respecting marriage, because it is celebrated by a person who actually, I

think, was chaplain to Dr. Crigan, the predecessor of my
* 375 Right * Reverend friend the present Bishop of Rochester,

Dr. Murray, the Bishop in whose time the marriage was celebrated. Here then is a clergyman who had been accustomed to celebrate marriages, who knew from his position, officially, clerically, and generally, the law upon the subject ; aye, and who knew another thing, — the high risk that he incurred if he did not celebrate the marriage duly. Is it to be presumed — is it to be really supposed, upon a mere want of memory in the Bishop, for there is a possibility that he might have forgotten, or upon the impossibility of Dr. Crigan, his predecessor, having granted this license, for you must exclude that also — is it upon these possibilities, or either of them, to be presumed that this clergyman should have been so reckless — he who had no kind of interest in running any risk at all ? Sir John Piers had an interest, and Lady Piers had an interest in running a risk ; but Mr. Stewart had no interest whatever. Mr. Stewart was a man cognizant of the law, who had acted under the law, who had been engaged officially in administering, I may say, the law, as the bishop's chaplain, and who exposed himself to utter and absolute ruin by celebrating a marriage irregularly. I cannot suppose that likely. It appears to me that that makes a short end of the question. I cannot conceive a man in his position incurring this risk for nothing ; and if he did not incur this risk, it was because, in fact, there was a license.

Then, as my noble and learned friend has most justly observed, the conduct of the parties concurs with the legal presumption, and every thing is opposed to that which would tend to rebut that presumption. Two years the marriage had been in contemplation,

and it is explained why it did not take place before. That

* 376 also * lets in the possibility of Dr. Crigan having granted a license, which, if you admit every tittle of the evidence in the cause, is not excluded, because all that Dr. Murray can tell you is, that he does not remember granting the license. Suppose Dr. Murray, instead of saying (for that is all his evidence amounts to), "I do not think I did — I do not recollect that I did," had actually, stringently and conclusively sworn, "I never did ; I know I never did ; for I have reason to know I never did ; I am

as certain I never did as I am certain I never committed felony, or my own self married irregularly without a license, and thereby committed a great offence." Suppose he had said that, which he has not said, he cannot tell what Dr. Crigan did ; he cannot tell what happened before his time ; he does not pretend to say so. Then am I to shut out all possibility of this having taken place before, when all that is to be urged against it is delay ? But Sir John Piers might have let the license lie over for a particular reason ; and, accordingly, a particular reason is actually afforded here with respect to the expectation of his brother coming over to celebrate the marriage.

Then they act accordingly ; they intended to marry. Had they a reason to intend to marry ? Most undeniably. There was a very considerable fortune and a Baronetcy depending upon it. Sir John Piers wished to have a legitimate son, and the lady was in that state which made it most likely that he should then wish the marriage to take place, because she was within some three or four weeks of her actual confinement. It might be done, therefore, to take the chance of a legitimate son and heir being produced by that lady to whom he was attached. Then they intended to marry. What did they do ? They performed what they believed to * be a valid ceremony of marriage ; and on the * 377 very day of the marriage Sir John Piers executed a settlement in which he calls the lady his wife.

Upon the whole, therefore, I entertain no doubt whatever in this case, that upon the merits there has been a miscarriage below. The only question, — and I was of the same opinion as my noble and learned friend the last time the cause was before your Lordships, — the only question which we had to consider was whether we ought not to direct an issue, as, generally speaking, this is the sort of matter which is sent to be tried by an issue. I should most deeply have lamented if it had been found necessary to send an issue, for this one reason among the rest that, as my noble and learned friend says, in the circumstances of this case, suppose the jury had come to the conclusion that there was no evidence of the license, or that it was disproved ; and led away by that or any other circumstance, or by the play at Nisi Prius, which one, who has lived so long in that atmosphere as some of us have done, knows to be practised, and knows too that though it may be very expedient for successfully reaching the truth, is not always with-

out the result of misleading the jury, the truth failing to be elicited. Supposing that from any such accident the jury had come to a conclusion contrary to what I verily believe the fact to have been, I am quite sure I should not have been satisfied by it, and the verdict would not have bound me. If it had gone back to the Court below, it would not have bound the Court. The Court is not bound by the verdict ; it may send it to another trial, but if the Court had been satisfied with that verdict, it would have come here again, and I should have been just in the same position in

which I am now — that is, always upon the supposition that

* 378 a different kind of * evidence would have been producible

before the jury than has been forthcoming before the Court, and is forthcoming and is produced before us. But would there have been any such further evidence? I am putting it very strongly in supposing that there might have been such evidence, the possibility of obtaining which very often tempts us, contrary to our wishes, to send cases to be tried where there is the possibility of the jury seeing and examining the witnesses when giving their evidence *viva voce*, a possibility which we have not in equity. But would that have been the case? I am putting it as supposing it had been ; but even then it would not have been conclusive. We are not bound, either by law or in fact, by the certificate of a Court. But here you could not have that parol evidence, nor any thing of the kind ; for, as my noble and learned friend has well observed, Ireland must be the place where the issue would have been tried. The witnesses are either in this House, the Bishop, or in the Isle of Man, and some of them dead. Then you would have, what? You would have a commission here to examine the bishop. But you have got his examination already. The Bishop would not give other evidence under any commission than what he has given under the last commission. The other evidence in the Isle of Man you would have, but it would be just the same as you have here. Then where should we be with an issue? We should stand precisely in the same position in which we stand at this very moment ; we should have the very same evidence, together with, what I should call, the useless verdict of a jury. Therefore, I most heartily rejoice, and for these reasons, that we do not find it necessary to send it to a jury.

* 379 No doubt if there is any thing to be done further, the * case ought to go back, but I see nothing here except the charge

upon the estate, and the validity of that charge of 4000*l.* depends upon the fact whether A. B. and C. D., in whose favour the power is to be executed, or the charge to be raised, are lawful children or not. If that is the whole question, I do not see, any more than does my noble and learned friend, any reason for sending it back. I therefore entirely agree with my noble and learned friend, that this case has been misdecided below, and that the judgment below ought to be reversed.

LORD CAMPBELL. — My Lords, it seems to me that this case depends entirely upon the effect to be given to the presumption of law in favour of the marriage. It is allowed that there is a presumption in its favour, and, until the contrary is proved, we are bound to draw the inference that every thing existed which was necessary to constitute a valid marriage, and among other things, that there was a special license from the Bishop of Sodor and Man. But it is likewise admitted on the other hand, that this is not a *præsumptio juris*, that it may be rebutted, and that it can only stand subject to the contrary being proved. The whole question, therefore, depends upon what sort of evidence is required to prove the negative, and to give effect to it. It seems to me, my Lords, as if the very learned Lord Chancellor of Ireland had been of opinion, that the only effect of the presumption is to shift the burden of proof; and that instead of the party who stands upon the validity of the marriage being obliged to show that there was a license, it lies upon the other side to impeach the validity of the marriage, and prove that * there was no license, but * 380 that the *onus* being shifted, then it is a question to be treated as any other fact between indifferent parties, and that the conclusion to be pronounced is one which depends merely upon the balance of testimony. It is quite clear, in my opinion, that this was the view taken of it by the Lord Chancellor of Ireland, from the issue which he proposed to direct; for if that issue had been tried, it is quite clear the jurors could merely have been directed to consider whether in their private belief there had been a marriage or not.

But it seems to me that that is entirely contrary to the well-established principles of law which have been long laid down and acted upon for the security of marriage. Indeed, Mr. Parker, as might be expected from a gentleman of his great legal discrimina-

tion and high professional eminence, allowed at the bar, as he was bound to do, that that was not the mode in which the validity of the marriage was to be tried; and he said, you must show a high degree of probability that there was not a license. That comes pretty much within the definition of the mode in which the presumption is to be rebutted, which has been cited by my noble and learned friend on the woolsack, from Lord Lyndhurst, and which has been acquiesced in by my noble and learned friend who last addressed your Lordships, with some slight modification.

My Lords, my opinion is, that a presumption of this sort, in favour of a marriage, can only be negated by disproving every reasonable possibility. I do not mean to say that you must show the impossibility of any supposition which can be suggested to support the validity of the marriage; but you must show * 381 that * this is most highly improbable, and that it is not reasonably possible. Because, otherwise there is a tremendous responsibility cast upon you with regard to the *status* of the woman and of the children. See the peril which you are encountering; because you may be deciding that a woman is a concubine, and that the children are bastards, upon a mere speculation, when in fact, contrary evidence may afterwards be produced, when it is too late, to show that there was that in existence which would render the marriage valid, the woman the wife of the person to whom she was married, and the children legitimate. My Lords, to avoid such a peril, the law requires that you should negative every reasonable possibility. Here, there are two possibilities which are suggested: first, that there was a license granted by Dr. Crigan, the former Bishop of Sodor and Man; and, secondly, that there was a license granted by Dr. Murray, who was the Bishop of Sodor and Man at the time when the marriage was solemnized.

In the first place, I must draw your Lordships' attention to the presumption of law which requires a Judge not to exercise his own private notion, or to indulge in his own private opinions upon the subject, but to believe that every thing was solemnly and effectively done. That is greatly strengthened here by the facts of the case; because that there was a marriage *de facto* is not denied. The parties were exceedingly anxious that there should be a marriage. The clergyman not only had the means of knowing the law of the island, but there is every reason to believe that he did know the law of the island; there is every reason to believe

that he was aware that if he solemnized a marriage contrary to the law, he was liable to severe penalties, and amongst others, to have his ears nailed to * the pillory. It is quite * 382 clear that the parties believed that they had celebrated a valid marriage; for on the very day on which the marriage was celebrated, Sir John Piers executed a deed, whereby he charged the estate, according to his power, with certain uses, and in that deed he calls the lady his lawful wife.

How then is this presumption, so strengthened, rebutted? Simply by the evidence of Dr. Murray, the late Bishop of Sodor and Man, now Bishop of Rochester. I look upon his evidence to be most candidly given; that he is as sincere as it is possible for a man to be; and that his mind is wholly unbiassed. But what does even his evidence amount to? Merely to this; that there was a conviction—no doubt a firm conviction—upon his mind that he had not granted a license, but only for the reasons which he assigns. Now the principal reason was, that he surely could not have granted the license, because Sir John Piers and the lady were living in concubinage. That might certainly be a strong reason against granting the license, but possibly also it might be a reason for granting it; because, if a letter had been written, or if a memorial had been sent to the Bishop, by Sir John Piers, stating that he had unfortunately been living with a lady as his mistress, that her condition was known in the island, that he was desirous of making her his lawful wife, and at the same time avoiding the publicity of the ceremony, and that he would have the marriage celebrated if he could procure a license and do it privately, it is possible that, for the purpose of rendering the connection between this man and woman a lawful one, the Bishop might have granted the license, he might or he might not, but whether it was so or not, it is impossible for us, at this distance of time, to ascertain.

* But there is another supposition: The Lord Chancellor, * 383 when listening to the arguments at the bar of this House, and when his mind is addressed, as it always is, to what falls from the learned gentlemen at the bar, may be signing thirty or forty documents. Supposing you were called upon to negative the fact that he had signed a particular document, which, there was no doubt, bore his genuine signature, if that document should not be forthcoming, would you negative the existence of it by Lord Cot-

tenham being called and saying, "I have no recollection whatever of having signed that instrument?" Notwithstanding all our high respect for him, should we be necessarily bound to believe that his opinion of what he had done or had not done was right, by some reason which he assigned for it, particularly if that reason should not be altogether satisfactory? Is it at all in a high degree improbable, taking Mr. Parker's test, that the secretary laid that instrument before him, that the Bishop signed it, and that, at a distance of thirty years, he has forgotten that he did so?

Your Lordships will also bear in mind, that I am not bound privately to believe either one speculation or the other. The question is, are they all satisfactorily negated? I am not bound to believe that Dr. Crigan granted the license; but it is possible that he may have done so, and that possibility is enough for me to act upon, if it is not satisfactorily negated. Where is the high improbability that he may have granted the license? In the first place, the license might have been granted, and Sir John Piers might have done, as I have known others do, who were living in concubinage, wait until the woman became pregnant, and he was likely to have issue by her, and then make her his lawful wife before * 384 the birth of the child. It appears in this * case, that they had been waiting for some time, till another clergyman, a brother, should perform the ceremony. I am not bound to say that that certainly took place, or that it probably took place; it may have taken place; there is no reasonable impossibility of its having taken place, and that is a supposition, to negative which not a tittle of evidence is brought before your Lordships.

It appears to me therefore, my Lords, that the presumption of law which exists in this case, and which is strengthened by the facts, is not at all met by contrary evidence, and that therefore we are bound to believe that the license existed.

As to the second point, upon which the Lord Chancellor of Ireland did not lay much stress, but upon which some stress has been laid at the bar, I must observe, according to what has been said by my noble and learned friend, who last addressed the House, that it is entitled to no weight whatever. I think during the argument it was mentioned that the Archbishop of Canterbury and the Lord Privy Seal had both been married in Scotland, and had afterwards been married in England. My Lords, I have by me an instance in the case of a Lord Chancellor. This is what was done

by a great lawyer, who, even at the time of his marriage, was eminent in his profession. No doubt was entertained about the marriage celebrated at Galashiel's being sufficient both at law and in equity. He had been married in Scotland by an Episcopalian clergyman, not by the blacksmith. He was married by a regularly ordained clergyman of the Church of England, according to the rites and ceremonies of the Church of England. With a view to the easy evidence of the marriage in future times, it was thought right to have the parties married in England, in conformity with the *provisions of Lord Hardwicke's Act. Accordingly * 385 the ceremony was again performed in the parish church of St. Nicholas, Newcastle, in the presence of the father of the bride, and the brother of the bridegroom, and the following entry was made of it in the register. (His Lordship read it; see *ante*, p. 355.) Now here she is described as a single woman, and only by her maiden name. In the present case there is an allusion made to the name which the woman acquired by marriage. In Lord Eldon's case it was the same. Therefore, according to that distinguished precedent, the second marriage, which, in the case before your Lordships was afterwards celebrated in Ireland, does not, in the slightest degree, impugn the fact that there had been a valid marriage in the Isle of Man.

Then we come to the question as to whether there ought to be an issue or not. I should deeply have deplored if there had been any rule guiding Courts of Equity, which required that there should be an issue. I am happy to find that there is none such. Then, as it does not come within the cases where there is such a rule, if there was such, with all respect we should be governed by it; but, there being no such rule, we have to consider whether it will further the ends of justice that such an issue should be directed.

My Lords, where there is no such rule for the guidance of a judge, I apprehend that he is to consider whether upon the matter submitted to him he thinks a jury will try that question better than he can himself try it. If he has no doubt, or if he thinks he can, under the peculiar circumstances of the case, come to a safer conclusion than a jury would do, it is his duty to decide himself, without granting an issue. My Lords, I cannot know what a jury would do; but I should say that any judge who should try this cause, and who *knew how the cause ought to be * 386

tried, upon such evidence as we have here, would direct the jury to find a verdict in favour of the validity of the marriage.

Then, my Lords, it is not suggested that there is to be any parol evidence taken — we have the whole case before us. Moreover, this is not a case depending upon the credit of a particular witness, where it is suggested that he has perjured himself, or that there is a conspiracy to deceive the Court, and to pervert the ends of justice. It might be proper in such a case to submit the facts to a jury, before whom the witnesses may be examined, and cross-examined, that they may see their demeanor, and judge whether they are to be believed or not. I give implicit credit to every syllable that the Bishop has said. Then why should there be an issue? I must say, my Lords, with respect to cases which are fit to be tried by a jury, no one has more respect than I have for the decision of a jury; but cases of this sort can just as well be tried by a single judge sitting in Equity, or by your Lordships sitting here as a Court of Appeal. I do not see why twelve gentlemen, wholly unacquainted with the rules of evidence and of law, should try it better. Therefore I rejoice to think that there is no such rule which compels us to grant an issue in this case; and there being no rule, I have no hesitation in saying that I believe there ought not to be an issue granted, but that we ought to follow the course suggested by my noble and learned friend.

Mr. Bethell applied for the costs of this appeal, and referred to *Stokes v. Heron*,¹ as laying down the rule that the costs of an appeal in a case where there had been a great miscarriage in the construction of a will, should be paid out of the estate.

* 387 He submitted * that that principle ought to be extended to the present case.

THE LORD CHANCELLOR. — The cases differ from each other. There the expense of the appeal was occasioned by the wrong construction of a will, which was purely an act of the Court. Here the question was one of fact, which it might have been necessary to carry to a Court of Law.

Mr. Bethell then called the attention of the House to the fact, that two Appendixes, containing the same evidence and documents, had been printed in this case, and an expense wholly unnecessary had therefore been incurred.

LORD BROUGHAM. — There ought never to be two Appendixes.

¹ 12 Clark & Finnely, at p. 203.

That is an abuse never practised in the Admiralty Courts, and which, though it once existed at the Privy Council, is now discontinued there. The same course ought to be followed here. The parties ought always to print a joint Appendix.¹

THE LORD CHANCELLOR. — I perfectly agree with my noble and learned friend on that point.

Decree reversed, and a new decree made, declaring the appellants the lawful children of Sir J. B. Piers, and the sums claimed to be charges on the lands comprised in the settlement, and remitting the cause to the Court of Chancery in Ireland, to give effect to this decree. Journals, 22 March, 1849.

1849. March 19, 22, 27.

WILLIAM HENRY ROCHFORD, *Appellant*.

THOMAS BATTERSBY, ELIZABETH BROWNE, and others, *Respondents*.

Appeal. Costs. Insolvent. Parties. Practice.

An insolvent debtor has not such an interest in property assigned under the Insolvent Debtors' Acts, as to entitle him to enter into any litigation respecting it.²

The circumstance that a person has been made a party to a suit in the Court below, if improperly so made, will not entitle him to appeal to this House against a decree made in that suit.

W. R. was the owner in fee of certain estates in Ireland, which, on his marriage with E., he charged with an annuity by way of jointure. W. R. had issue a son, W. H. R., and died. For some years the annuity fell into arrear. The widow (under the terms of the settlement) entered into possession of the estates,

¹ The practice had probably been adopted upon a construction of the following Standing Order. No. 119, formerly No. 194, 8th December, 1813. — "Ordered, That in all cases of appeals and writs of error, which were depending in this House, and the printed cases in which were delivered on or before the 24th day of February, 1813, the party or parties do respectively print an Appendix to the said cases delivered, and do therein set forth so much of the proofs taken in the Court below as they intend to rely on respectively on the hearing of the said causes, and which is not already set forth in the printed cases by them so respectively delivered; and that such Appendix do contain a reference to the documents where the same may be found, &c."

² See *Beckham v. Drake*, 2 House of Lords Cases, 579; *Galbraith v. Cooper*, 8 House of Lords Cases, 315, 321.

and received the rents. W. H. R. became insolvent, and the assignments, usual under an insolvency, were executed. W. H. R. afterwards mortgaged to B. his interest in the estates, without giving notice to the mortgagee of his previous insolvency. He gave, as further security, a bond and warrant of attorney, it being thereby provided that B., on redemption of the mortgage, should reconvey the lands, and sign satisfaction on any judgment which might have been entered up on the warrant of attorney. The mortgage was duly registered, and therefore, under the Irish Acts, took priority over the assignments, which had not been registered.¹ A bill for foreclosure or redemption was filed by B., the mortgagee, who made the jointress, the insolvent, and the assignees, parties thereto. The Court decreed the jointure to be the first charge on the estates, and the mortgage to come next, and directed accounts to be taken accordingly. The assignees did not appeal against this decree. The insolvent presented an appeal against it : —

Held, that he ought not to have been made a party to the suit, and therefore had no title to appeal against the decree.

* 389 * An objection to the competency of an appeal ought to have been presented to the Appeal Committee, but was not noticed till the case came on for hearing at the bar of this House : the objection was in its nature fatal : — The House therefore dismissed the appeal, but, because the objection had not been taken till so late a period, dismissed it without costs.

THIS was an appeal against certain parts of two decrees of the Court of Chancery in Ireland, dated respectively 15th February, 1846, and 16th June, 1847, and made in a cause in which the respondent Thomas Battersby was the plaintiff, and the appellant and the other respondents were the defendants. The suit was instituted under the following circumstances : Elizabeth Browne, originally Elizabeth Sperling, had been three times married ; first, in 1788, to William Rochfort, Esquire, of Portland Place, in the county of Middlesex, and the appellant was the only issue of that marriage. Mr. Rochfort died in 1798, and in 1801 his widow married the Reverend William Beville, who died in 1822, without issue, and in 1827 she married General Charles Browne, who died in 1836.

By a settlement made on the first of these marriages, and dated 17th May, 1788, Mr. Rochfort conveyed his estates in Westmeath and elsewhere in Ireland, to the use of himself for life, and after his death, to the use that his intended wife should receive thereout an annuity of 480*l.*, for her jointure, in bar of dower and thirds, with remainder to trustees for ninety-nine years, without impeachment of waste, for the purpose of raising this annuity, remainder

¹ *Eyre v. McDowell*, 9 House of Lords Cases, 619.

to the use of the first son of the marriage in tail, and with divers remainders over.

The settlement also contained a covenant by Mr. * Roch- * 390 fort with the trustees, which (so far as it related to the jointure of 480*l.* per annum) was as follows: "That in case at any time from and after the decease of the said William Rochfort, by any arrear whatsoever, the clear yearly rents and profits of the premises comprised in the before-mentioned term of ninety-nine years, or intended so to be, should not for the time being be sufficient to pay and keep down and satisfy the yearly rent or annual sum of 480*l.* thereinbefore secured to be paid unto the said Elizabeth Sperling, for her life, in case she should survive the said William Rochfort, by and out of the same, as and in part of her jointure as aforesaid, * * or if the person entitled to the said annual rent or yearly sum should not be paid the same according to the true intent and meaning of that indenture, that then and in every such case, the heirs, executors, or administrators of him the said William Rochfort, some or one of them, should and would out of their, his, or her own proper monies, make up and duly pay the said annual rent or sum of 480*l.* unto the said Elizabeth Sperling, or her assigns, * * * or so much thereof as should not have been paid at the times and in the manner and by the means thereinbefore expressed, and according to the true intent and meaning of that indenture." The rents and profits of the lands comprised in this settlement were never, before the year 1835, sufficient to pay the jointure or annual sum of 480*l.* To make up the deficiency, an indenture was executed, dated the 15th of June, 1792, and made between Sir John Hadley D'Oyley of the first part; the said William Rochfort of the second part; and John Gustavus Lemaistre of the third part; by which Sir John Hadley D'Oyley, for a valuable consideration, * granted to Mr. Rochfort, his executors, &c. * 391 during the life of Mrs. Rochfort, and for her benefit, an annuity of 138*l.* 10*s.* of lawful money of Great Britain, charged upon certain lands and hereditaments therein mentioned.

At the time of Mr. Rochfort's death, the aggregate rents of the settled estates charged with the jointure of 480*l.*, under the deed of 1788, amounted only to the sum of 290*l.* per annum, late Irish currency, and such rents being insufficient to satisfy the jointure, the respondent Elizabeth Browne then entered into possession or

receipt of the rents and profits of the whole of the settled estates, and she has ever since continued in receipt of such rents and profits, and in the management of the estates.

By an indenture, dated the 5th of February, 1801, and made previously to the marriage of Mrs. Rochfort with Mr. Beville, reciting the settlement of May, 1788, and the deed of June, 1792, and that the clear annual rent of the lands and hereditaments charged with the payment of the said annuity of 480*l.* did not then, upon an average, exceed the sum of 240*l.*, Mrs. Rochfort assigned the annuity, and all arrears and future payments thereof, and all powers and remedies for recovering and enforcing the payment thereof, and also the said annuity of 138*l.* 10*s.*, to two persons therein named, and also demised certain lands to the same persons for a term of years, upon a certain trust which has since ceased, and subject thereto it was declared, as to the annuity of 480*l.*, that the trustees "should, during the joint lives of Elizabeth Rochfort and Mr. Beville, receive and take so much of that annuity as the clear yearly rents and profits of the hereditaments charged with the payment thereof should from

* 392 time to time be sufficient to pay and satisfy, and * should pay over the same when so received to Elizabeth Rochfort, and should stand and be possessed of and interested in the arrears then due and owing of the said annuity of 480*l.*, and also of and in all the arrears which should thereafter accrue or become due of the same annuity, in consequence of the rents, issues, and profits of the lands and hereditaments charged therewith being insufficient to answer the same"; upon trusts, relating to the appellant, and to the children of the intended marriage, that never happened.

In the year 1819, the appellant, being tenant in tail in possession, suffered a recovery of the settled estates charged with the jointure of 480*l.* per annum, and by the deed to lead the uses of such recovery, dated the 18th June, 1819, and made between Mr. Belville and his wife of the first part; the appellant of the second part; and other persons of the third and fourth parts; after reciting the two settlements of May, 1788, and February, 1801, and that the yearly proceeds of the hereditaments on which the annuity of 480*l.* was charged had, ever since the decease of Mr. Rochfort, fallen considerably short of that annuity, it was agreed that the recovery should operate for confirming unto the persons

named in the deed of 1801, the annuity of 480*l.*, and all the arrears and future payments of the same, and all the remedies for recovering payment thereof, and the trusts declared of the same by that deed, so far as these trusts were then subsisting and capable of taking effect, and subject thereto, to the use of the appellant, his heirs and assigns, for ever.

In the year 1821, the appellant was discharged as an insolvent debtor in England; and on the 21st of July, 1821, he executed an assignment of all his real and personal estate to the provisional assignee of insolvents in England, who, by deed of the 17th of February, * 1823, assigned the same to the assignees of * 393 the estate and effects of the insolvent, who were also made respondents in this appeal, but who took no part in complaining of the decree.

The assignment was not registered. In November, 1834, Mrs. Browne, by certain legal proceedings, set aside a lease for years of part of the settled estates, made by Mr. Rochfort, after which that part of the estates was relet, and from that time the aggregate yearly rents of the estates comprised in the settlement of 1788 have considerably exceeded the sum of 480*l.* sterling per annum, and the value of the estates has been since further increased, so that at the present time they produce the clear yearly sum of 850*l.*, or thereabouts.

By an indenture of the 30th March, 1841, the appellant mortgaged these estates in fee simple to Thomas Battersby, for securing the sum of 3000*l.* and interest; and the debt was further secured by bond and warrant of attorney, on which judgment had been entered up; such mortgage was still a subsisting security. This mortgage was duly registered under the 6 Anne, c. 2, by which all conveyances of lands in Ireland, whether executed in Ireland or not, are to receive priority according to the date of their registration.

On the 24th November, 1843, Battersby filed the bill in this cause against the appellant, and against his assignees, and against Elizabeth Browne and others claiming interests respectively as encumbrancers upon the appellant's interest in the settled estates, and also against the surviving trustee under the settlement of February, 1801, praying that an account might be taken of the sums remaining due to Battersby for principal; interest, and costs, on his mortgage and the securities collateral therewith, and

* 394 that the appellant might be * decreed to pay to Battersby the sum so found due, or in default might be foreclosed, and that the mortgaged premises, or a competent part thereof, might be sold, subject to the jointure or annuity of 480*l.*, payable to the respondent Elizabeth Browne, and to the remedies provided for recovering the payment thereof; and that the proceeds of such sale might be applied to the payment of Battersby's demand, with costs.

The bill also prayed, in the usual manner, that all proper parties might be compelled to join in the sale, and for a receiver and an account.

Answers were put in by most of the defendants, and it was insisted on the part of Mrs. Elizabeth Browne, that she was entitled to have the full amount of all the arrears of the jointure of 480*l.* from the 5th of February, 1801, to the year 1835, raised and paid to her under the trusts of the term of ninety-nine years, created by the settlement of 1788, notwithstanding the trusts as to such jointure, and the arrears thereof, contained in the settlement of the 5th of February, 1801; this claim was resisted by the appellant, and all the other respondents.

On the 13th February, 1846, Lord Chancellor Sugden made the first decree now appealed from, declaring, among other things, "that the surplus yearly rents and profits of the lands and premises in the pleadings mentioned, over and above the amount of the jointure or yearly rent-charge of 480*l.*, payable to the said Elizabeth Browne under the said deed of marriage settlement, bearing date the 13th day of May, 1788, which had arisen or accrued, or should thereafter arise or accrue during the joint lives of the said

Elizabeth Browne and the appellant, were applicable to the * 395 payment of all arrears of the said jointure * which accrued from and after the 5th day of February, 1801, being the date of the settlement executed on the marriage of the said Elizabeth Browne with the said William Beville." And an account was ordered, and the Master was to report on the priorities of the different claims upon the estate.

The Master made his report on the 14th of May, finding, among other things, "that the arrears now due on the jointure of 480*l.*, after giving credit as against the same for all sums whatever received by Elizabeth Browne, from or on account of the surplus rents and profits, amounted to the sum of 5820*l.* 5*s.* 7*d.*, which

arrears were secured by the unexpired residue of a term of ninety-nine years in the lands and premises in the pleadings mentioned, limited by the deed of marriage settlement of the 13th of May, 1788, commencing and to be computed from the decease of William Rochfort. The Master also found that this sum of 5820*l.* 5*s.* 7*d.* is the first charge on the said lands and premises, to the extent of the residue now unexpired of the said term of ninety-nine years. And that the said sum of 5820*l.* 5*s.* 7*d.* is now vested in the surviving trustee of the marriage settlement of February, 1801, upon the trusts therein declared in relation thereto; and that the statute of limitations is not applicable to the said arrears. The Master also found a sum of 3818*l.* 18*s.* 0½*d.* due to Battersby for principal and arrears of interest.

The appellant filed eight exceptions to this report, insisting, among other things, that no sum was due for such of the arrears as were barred by the statutes of limitations, and that the covenant of the deceased William Rochfort to make good the annuity of 480*l.* was in part performed by the purchase of the annuity * from Sir J. H. D'Oyley, the sums received from which * 396 had not been properly taken into account by the Master.

By the second decree made at the hearing, on the above exceptions, and other exceptions taken by Battersby, and upon further directions on the 16th of June, 1847, the present Lord Chancellor of Ireland overruled all the exceptions, but ordered the deposits to be returned, and the costs of each party on the exceptions to be costs in the cause. And the Master's report was confirmed. "And it was ordered and decreed, that the appellant, or such other of the defendants as ought so to do, should, within three calendar months, to be computed from the date of that decree, pay to the plaintiff, said Thomas Battersby, the sum of 3818*l.* 18*s.* 0½*d.*, reported due to him for principal, interest, and costs, on his mortgage, and a judgment collateral therewith, with subsequent interest and costs to be taxed as therein mentioned, and should also lodge in the Bank of Ireland, with the privy of the Accountant-General of the Court, to the credit of the cause, the sum of 5820*l.* 5*s.* 7*d.* reported due for the arrears of the jointure or rent-charge of 480*l.* payable to the said defendant Elizabeth Browne, and also pay to the defendant Elizabeth Browne her costs in the cause, when taxed and ascertained"; and it was further ordered, that Battersby should reconvey the mortgaged lands and premises, free and clear

from all encumbrances made by him, or any person claiming by, from, or under him, and deliver up upon oath all deeds and writings in his custody or power relating to the said lands, and in default of due payment to Battersby of such principal, interest, and costs, that W. H. Rochfort should be for ever barred and * 397 foreclosed from all * equity of redemption in the mortgaged lands and premises. It was further ordered, that the Master should sell, according to the course of the Court, the lands and premises comprised in Battersby's mortgage, or a competent part thereof, such lands to be sold subject to the jointure of 480*l.* payable to Elizabeth Browne during her life, and out of the money to arise by such sale, that the sum found due for arrears of the jointure, being the first charge on the said lands and premises, should be in the first place lodged in Court to the credit of the cause, to abide the further orders of the Court, and that Elizabeth Browne should be paid her costs of suit.¹

The appellant appealed against both these decrees.

Upon the appeal being called on and partly opened, —

Mr. Bethell objected that it was not competent to the appellant to be heard in this case. This is an appeal by an insolvent, whose assignees do not appeal against the decrees, though they were parties to the suit in which those decrees were pronounced. In this suit, which was a suit by the mortgagee against the appellant, certain trustees of the mortgaged estates, and the jointress, she set up here claims under the jointure as a prior charge on the lands, and a report was made in her favour. To that report the assignees took exceptions, which were overruled, and the second decree was made. The assignees do not appeal against this second decree. The insolvent cannot do so.

[LORD BROUGHAM. — Was he not a party to the suit below ?]

He was.

* 398 * [LORD BROUGHAM. — And the decree was against him as well as against the assignees. Can it be doubted that he has an interest in the matter ?]

He cannot properly be a party to the suit, nor consequently to the appeal. All his interest is now vested in his assignees, and they do not complain of the decree.

¹ 2 Jones & La Touche, 431.

Mr. Turner and Mr. R. Palmer. — The appellant shows himself in this way to be a party aggrieved, that his future rights are affected by the operation of these decrees. He may therefore be properly a party to the suit and the appeal. He has a direct interest in the surplus. It is true that the appellant is an insolvent debtor, but the mortgage was made by him subsequent to his insolvency, and it is only in consequence of there having been no registration of the title of the provisional assignee, that this mortgage was adjudged to take precedence of the assignment under the insolvency. It is this title to precedence which is disputed. The sum claimed by Battersby is secured to him, not only by a mortgage of the property, but by a bond and a judgment entered up on a warrant of attorney. The proviso for redemption does not follow the ordinary form, but is in these terms: "Provided that if Rochfort shall pay 3000*l.* with interest, Battersby will, at the expense of Rochfort, reconvey the town lands, and if any judgment shall be entered up upon such bond, he shall sign satisfaction to that judgment." There is, therefore, by the contract between Battersby and Rochfort, an obligation upon Battersby, not only to reconvey the estate, but to redeliver the bond and the warrant of attorney in order that they may be cancelled. The bond and the judgment are debts which * affect * 399 the future property of Rochfort; and he has therefore a direct interest in the question whether the mortgage is satisfied, and an interest in the property when it shall have been satisfied.

[THE LORD CHANCELLOR. — That is always so under an insolvency.]

The future property of the insolvent in this case is not to be considered in the same light as future property in ordinary cases of insolvency; for here there is a contract on the one side to pay, on the other to reconvey, which is, in addition to, and independent of, the ordinary legal liability. Such a contract is recognised by the Courts, and the title of a bankrupt or an insolvent to the surplus is recognised; for a bankrupt cannot be examined in a matter which may affect his surplus, without first releasing it. If nothing is done in respect of the mortgage, the insolvent is entitled to have the bond delivered up, and satisfaction entered upon the judgment. He is therefore entitled to know whether the amount due on the mortgage is smaller than is claimed, and con-

sequently he is a proper party in a suit where the amount due on that mortgage is a point in question.

[THE LORD CHANCELLOR. — In that case every insolvent and bankrupt would be a necessary party to a suit between a mortgagee and the assignees.]

If the mortgage enjoyed no priority over the assignment, the Court might have power to say to the insolvent, you have no title to come into Court; but if the mortgage or any other charge takes the priority, he has a right to come in and see that, as against the assignee and his own future property, every due allowance in account is made.

* 400 * [LORD CAMPBELL. — Can you ask any thing of this House for the benefit of your client?]

Perhaps so, in the result of this case. Here, 5000*l.* are claimed for arrears: if this appeal succeeds, the priority of that charge is removed; the estate is to be sold, and the debts paid. The removal of the priority of the charge of 5000*l.*, which now stands as the first charge, will affect the means of satisfying the bond and the warrant of attorney, the sum secured by which constitutes the second charge. On the first of these instruments, both of which must then be cancelled, the insolvent is personally liable, as much as if he never had been an insolvent.

[THE LORD CHANCELLOR. — But here his interest is the other way. The decree gives priority to the mortgage.]

Yes, as against the assignment. But still the whole property is first subject to the arrears of 5000*l.* There is no complaint of the priority of the mortgage as against the assignment. The complaint relates to the priority of the arrears of the jointure, which leaves the mortgage unsatisfied, and so continues the bond and warrant of attorney in full force. No such case could occur in England, but in Ireland it arises through the effect of the Registration Acts, which have, in this instance, given priority to the mortgagee over the assignees.

But let the case be considered independently of the Irish Acts. Let it be treated as one simply of a mortgage by Rochfort to Battersby. Then the mortgage debt is a mortgage of the surplus, which the insolvent might have after his liability under the insolvency had been discharged. It cannot be said that the deed, which passed all his property, did not pass the surplus of that property.

[THE LORD CHANCELLOR. — The decree puts the mortgagee * before the assignees, and to that part of the decree * 401 there is no objection.]

But to try the case; suppose it to be the other way. If the insolvency has passed the estate to the assignees, they hold under a trust for payment of debts, but if the insolvent afterwards creates a mortgage on that estate, that would pass an interest after the debts had been paid. The mortgagee would have a right to foreclose that interest, and the mortgagor would have a right to redeem.

[THE LORD CHANCELLOR. — This is a question as to priority of claim between the assignment and the jointure. In such a case can the insolvent be a proper party?]

That must depend on the terms of the contract between the mortgagee and the insolvent. The case of *Taylor v. Rothwell*, assignee of Fairleigh,¹ though not directly in point, has in principle a strong bearing on this case. There, an insolvent had been made a party to a suit like the present. The Lord Ordinary had fixed him with costs; he appealed to the Court of Session, which refused to hear him till he had given security for these costs. Against that order he brought an appeal to this House, and by this House the order of the Court of Session was held entirely wrong, and was reversed. The principle to be deduced from that case is, that if a party, though insolvent, is brought into Court by another party, and heard in the Court below, it is not competent for the Court to refuse to adjudicate on his claim of right.

[THE LORD CHANCELLOR. — But here the insolvent is not brought in by an adverse party.]

* There is, it is true, that distinction, but still the interest * 402 of the insolvent here is a substantial interest, which has formed the ground of adjudication in the Court below; and as to that adjudication, he cannot be refused the right of appeal.

Mr. Bethell. — It is a settled rule, that an insolvent's estate can only be administered by assignees. In *Heath v. Chadwick*,² there was an attempt to evade that rule, but it failed; and that case may be referred to, not for similarity of facts, but for the manner in which the whole subject is treated. In addition to the authorities

¹ 6 Wilson & Shaw, 301.

² 2 Phillips, 649.

which are there cited in the judgment,¹ those of *Lloyd v. Lander*,² where, on demurrer, a bankrupt was held to be an unnecessary party to a bill of foreclosure by a mortgagor against the assignee, — of *Collins v. Shirley*,³ where the same doctrine was applied in the case of an insolvent, — and of *Kerrick v. Saffery*,⁴ where it was likewise held that a mortgagor who had become a bankrupt was not a necessary party to a suit of foreclosure, may be mentioned.

[THE LORD CHANCELLOR. — Here the Court has in fact made a decree for foreclosure or for redemption, dealing with the insolvent as a party interested in the estate to be administered.]

The alternative part of the decree is entirely erroneous.

[THE LORD CHANCELLOR. — But however wrong it may have been in the Court below to allow the insolvent to be a party to the suit, yet, as here is a decree not appealed against, giving * 403 him a right to deal with the * property, how can his right to appeal against a part of that decree, which limits or affects his right in the property, be denied?]

Here the party objecting to his right is a co-defendant. The error of the original plaintiff, in making him a party to the suit, cannot affect the rights of the jointress, the real respondent in this appeal.

[THE LORD CHANCELLOR. — The second decree gives him a *status* in the suit. The two decrees are connected together, and if he has a right to appeal against one, he may appeal against both.]

By the second decree he is clothed with liberty to redeem the estate. But that does not affect claims previously settled and ascertained. The case is the same as if the litigation up to a certain point had been properly settled, and then a mistake was made in introducing a senseless order, and an unnecessary party. That mistake would not give such a party the right to appeal against all that had been done.

Mr. Turner, in reply to the cases cited.

These cases, especially that of *Lloyd v. Lander*,⁵ are inapplicable. Here there is an interest beyond that of the mortgagee or of the

¹ 2 Phillips, at p. 652.

² 5 Maddock, 282.

³ 1 Russell & Mylne, 638.

⁴ 7 Simons, 317.

⁵ 5 Maddock, 282.

assignees. The bankrupt has an interest in all the estate, as against the arrears of the jointure ; and the mode of taking the accounts directed by the decree will affect his right in respect of those arrears and of the jointure itself.

March 27.

THE LORD CHANCELLOR. — In the discussion of this case, it appeared that an appeal had been brought by a party who had taken the * benefit of the Insolvent Debtors' Act. The con- *404 test in the suit itself was between a mortgagee, who had obtained a mortgage, and a mortgagor, who had granted it, after taking the benefit of the Insolvent Debtors' Acts. Owing to the provisions of the act for the registration of mortgages in Ireland, a question arose, whether that mortgagee was or not to be preferred to the assignees under the Insolvent Act. The Court was of opinion that the mortgagee, under the provisions of this registration act, was entitled to priority, and the decree therefore proceeded upon that decision. The details of that decree are not here a matter in question. It was a suit which was a mere contest between the parties claiming an estate, and the insolvent, — for some reason or other which does not appear, — was made a party defendant. I say that it does not appear, — for although it was very ingeniously put at the bar, that the personal obligations into which the insolvent had entered after his insolvency might be affected by the result of this litigation, that had nothing to do with the suit. It was a suit simply to ascertain the rights, as between the mortgagee and the assignees under the insolvency, to priority upon the insolvent's estate. And whatever question may arise in consequence of the insolvent having entered into personal contracts after the insolvency, that circumstance could not possibly affect the rights of the parties to the property which passed under the Insolvent Act, and which was affected by the mortgage, nor does any thing of that sort appear upon the face of the proceeding. I mention that only, because it was relied on at the bar, but that does not at all affect the present question of the propriety of having made this insolvent a party to the suit below. The objection does not appear to have been taken below, and naturally enough it *did not strike the parties appearing there and *405 taking upon themselves the discussion of the question, that

this insolvent, having parted with all his interest in the property, could not be heard to dispute a matter affecting the property which he had prior to his insolvency, but which had thereby passed to the assignees. Accordingly the suit proceeded, and a decree was pronounced in favour of the plaintiff, the mortgagee, — the insolvent remaining a party to the record. Now the decree having established the priority of the mortgagee's title, the assignees, who were alone interested in the case, of course as representing the body of the creditors, acquiesced in that decree, and have not complained of it at your Lordships' bar ; but the insolvent has complained of it, and he has become an appellant, and as an appellant questions the propriety of the decision of the Court below.

Now it is a matter to be regretted that the question of competency was not raised in the early part of the proceeding, before the Committee of Appeals, which is the proper tribunal in the first instance to dispose of questions of that sort. If there it had been found that there was any difficulty or doubt about the point, the regular course would have been to refer it to the House ; but the question ought to have gone before the Committee of Appeals in the first instance. Ordinarily speaking, where no question of difficulty occurs, the Appeal Committee disposes of any matter of that sort, and by so doing saves very great expense and delay to the parties, who, otherwise, might be needlessly brought here in the regular course for hearing the appeal, when upon discussion here it might turn out that the appeal could not be entered into, in consequence of the defect of title of the party appealing.

* 406 The proper course is * to avoid needless expense, by discussing the question of competency before the Appeal Committee. That course, however, was not adopted in the present case ; but the objection as to competency necessarily presented itself upon the discussion of the appeal. The question raised, and which was argued before your Lordships, and which we have now to dispose of, is whether the party appealing is a competent party to claim, at your Lordships' bar, the revision of the decree of the Court below ? The appellant had been improperly made a party below ; it is therefore quite obvious that that is no reason why he should be heard here ; because the question of incompetency may arise very well between parties who are parties to a cause. The question is, whether they have that interest in the subject

matter which would entitle them to appear here as parties questioning the propriety of the decision below. There certainly may be causes in which parties are made such for some matter in which they may have some probable interest, and that matter having been decided below, they come here on the ground that they were parties to the original cause, and have therefore a right to appeal against a decision on a matter in which they have an interest; but if they come here and appeal against a matter in which they have no interest, the House will not hear them, because they are incompetent to raise a discussion of such a matter, and *a fortiori*, if they appear improperly as parties in the Court below, this House will not permit them to raise here an argument in a matter in which they had no interest, even in the Court below.

Now, my Lords, it is much too late to discuss the question whether this appellant is a proper party to this cause,—having already disposed of that portion of * the ground on which * 407 it was contended that he ought to have been a party to the cause,—I mean the personal contracts into which the insolvent entered subsequently to his insolvency, and confining my observations to his interest in the property which passed by the insolvency, beyond all doubt the insolvent was not a proper party to a contest, relative to a priority of charges upon that property passing to the assignees.

My Lords, many cases have been quoted on this subject. In a late case, I had occasion, in the Court of Chancery, to consider those cases, and I can see no reason whatever, from any thing that has passed on this occasion, to alter the opinion that I then expressed. What I did express, after a consideration of all those cases, is to be found in *Heath v. Chadwick*,¹ in which I state this as the result of an investigation of those cases: “The acts give ample power to the jurisdiction created by them, to meet all such cases as are stated in the bill, particularly by the removal of the assignee, if he improperly uses or omits to use the authority vested in him; and it is obvious that if individual creditors were permitted to file bills in this Court instead of resorting to the jurisdiction specially created for enforcing their rights and interests, the public would be deprived of much of the benefit of such special jurisdiction, and much of the business which ought to be transacted

¹ 2 Phillips, at p. 651.

there would be transferred to this Court. I have therefore much satisfaction at finding that, in several recent cases, this subject has, as it appears to me, been put upon a proper footing. In *Yewens v.*

Robinson,¹ the Vice-Chancellor of England decided against * 408 the right of creditors to file a bill * upon these grounds, as he had before, in *Kaye v. Fosbrooke*,² decided against the right of an insolvent debtor to file such a bill ; which was also the decision of Vice-Chancellor Wigram, in *Major v. Auckland*.³ The point indeed has been long settled ; *Spragg v. Binkes*,⁴ *Benfield v. Solomons*,⁵ *Saxton v. Davis*,⁶ *Hammond v. Attwood*.⁷ Some of these were cases in bankruptcy, but the principle is the same, and all of them, except *Yewens v. Robinson*, were bills filed by insolvents or bankrupts, or persons claiming through them ; but upon demurrer, the bill alleging a surplus, the equity of the bankrupts and insolvents cannot be distinguished from that of their creditors. *Barton v. Jayne*,⁸ and the case under appeal, are the only decisions I am aware of, holding that such bills can be maintained.

The case of *Collins v. Shirley*⁹ brings the case, not more in principle, but more in point of fact, within the circumstances of the present case ; and, as it seems to me, they are identically the same. There, a bill of foreclosure had been filed against the insolvent and his assignees, upon which the assignees disclaimed, and offered to release. The assignees claimed no benefit in the mortgage ; the title of the mortgagee had been prior to their own, and they therefore abstained from litigating the point. The discussion arose upon a question of costs. The assignees withdrew from the contest, and it remained only between the insolvent and the mortgagee. "The Master of the Rolls held that the assignees were * 409 * not entitled to their costs, but that Shirley had been made a party improperly, and ought therefore to have his costs." That was identically the same as here. The assignees represented the property, and were therefore properly made defendants. But as to the insolvent, the Master of the Rolls, Sir John Leach, said, that he was improperly made a defendant ; the consequence was,

¹ 11 Simons, 105.

² 8 Simons, 28.

³ 3 Hare, 77.

⁴ 5 Ves. 583.

⁵ 9 Ves. 77.

⁶ 18 Ves. 72.

⁷ 3 Maddock, 158.

⁸ 7 Simons, 24.

⁹ 1 Russell & Mylne, 638.

that the Court gave him his costs. Now all these cases refer to the state of the matter as it stands on this appeal, and show that the insolvent under the Insolvent Debtors' Act is not considered by the Court as having any such interest in the property as entitles him to enter into any litigation respecting it. It cannot be stronger than this. We find a bill filed by the insolvent, alleging, upon the face of it, that there is a surplus, which practically is made use of by him to show that he had an interest; but although the law would give him back again that surplus, if it should ultimately arise, the Court says, "Although you have alleged that fact, a demurrer might be taken to that allegation on the ground that that fact does not, under the statute, give you such an interest as entitles you to sue upon it." A demurrer is therefore held to be good to a bill filed by an insolvent, although he alleges a probable surplus, and although he alleges combination and conspiracy to rob him, as between the assignees and the creditors. There cannot be a stronger proof therefore that the Courts have always considered these Acts of Parliament as divesting the insolvent of all title and interest in the property, which would authorise and justify him in entering into any litigation respecting it. This objection ought to have been taken in the Court below, and the bill ought to have been dismissed as against the insolvent; but the Court did not adopt * that course, but made a decree * 410 apparently as if the party had not been an insolvent at all, decreeing a foreclosure against him, which might ultimately lead to a redemption by him.

We have nothing to do, in the present question, with that portion of the decree. The matter we have to dispose of is, simply whether this party has a right to come here to complain. Now, being of opinion that he was improperly made a party, and cannot be heard by way of appeal, it is not very material to consider how far the decree is or is not for his benefit. Beyond all doubt, it is for his benefit, inasmuch as it gives a priority to his mortgagee, and may, *pro tanto*, be a relief to him. I do not put it upon that at all, because however that may be, he is improperly made a party to this litigation.

Then, my Lords, the question is, whether you can hear him as an appellant? The moment you show that he had no recognised interest in the property or in the matter, there is an end of his competency to raise the question. It is not for him to raise that

question here, any more than it would be for a stranger who, by accident or inadvertence, might have been made a party to a suit, but who had no connection with the subject matter at all. In such a case as that, the Court would hold that a party appealing had improperly appealed, not having such an interest as entitled him to litigate upon the subject at all, and it appears to me that this appellant stands precisely in that position ; and without at all entering into the merits of the case, which we are not called upon to discuss here, I am of opinion that this party is not competent to support this appeal ; and on that ground I move your Lordships that the appeal be dismissed.

*411 *LORD BROUGHAM. — My Lords, I entirely agree with my noble and learned friend. I had some little doubt at first, because of the appellant having been heard in the Court below, and thought that though probably he ought not to have been allowed to appear there, yet, that as he did appear there, he could not be refused the liberty of appearing here. But I have clearly come to the same opinion with my noble and learned friend, that he has no *locus standi* here at all. I agree also with my noble and learned friend, that whatever interest he may have in the decree below, that is quite immaterial to the present question.

My Lords, I cannot help feeling that there is a very great defect in the Insolvent Act, which, in this respect as well as in others, ought to be remedied. Though a debtor comes into Court, as my noble and learned friend has stated, and has shown a case, he can only be represented by his assignees ; he has personally no *locus standi* in Court, and therefore cannot be a party to the suit. Here the case is that of a debtor coming into Court, who has no *locus standi*, but whose property has passed to assignees by assignment under the insolvency.

But my Lords, my objection to the present state of the insolvent law is this, that a very great hardship may be worked, and very serious mischief may be done to an insolvent, from a want of power in the Insolvent Debtors' Court to compel the assignees to lend him the use of their names for the purpose of prosecuting his rights, which they may refuse from malicious motives, spite towards him, or from collusion existing between them and the creditors, or from their saying, " We are satisfied ; we have

got enough. We have got 20s. in the *pound," or even *412 a less sum. It may happen that there may be a claim on the part of the insolvent, a perfectly sound and well-grounded claim to property or to a sum of money, to a legacy for instance, or to an estate, but which yet cannot be obtained without the assignees granting the use of their names, which the assignees now have a right to refuse.

The Lord Chancellor of Ireland, Sir Edward Sugden, when first the matter came before his Court, felt the great hardship of Mr. Rochfort's case in this instance so much, that there was some correspondence as to how far the Insolvent Commissioners here had the power of compelling assignees, upon an indemnity of course, to appear for the insolvent, or to allow him the use of their names. It was of course felt that they might say, "Why are we to go into Court at the risk of costs? We have no security that we shall be paid the costs." But still the question arose whether by a proper indemnity being afforded, they could be compelled to lend the use of their names. It was at first thought that there was a power of compelling the assignees to take some course of that kind, and the late Mr. David Pollock looked into the matter with the view of seeing whether such a power existed. At first he was rather inclined to think that there was that power; but after he had looked into the Act of Parliament he found that that was not the case. A bill was then framed which passed through this House, and went to the other House of Parliament, to remedy that great and grievous defect. That bill, perhaps, went too far in one direction, though probably not far enough in another. An objection was taken to the bill, and it dropped in the other House of Parliament. My Lords, something ought to be done to enable parties to obtain *the use of the names of the assignees, of course, *413 upon a due indemnity being secured to them, in order to remove the grievance which at present exists. Upon that subject the Commissioners were quite of that opinion, and they in fact drew the bill of which I have spoken. It was first framed in a way to decide the question, and to give Mr. Rochfort final judgment by Act of Parliament in his favour. That clearly would never do, and therefore it was left out here; it went down to the other House without that objection, and was there lost; but I trust that many months of the year will not pass over before that is altered.

My Lords, all that remains for us to say is, that this gentleman

is, as the law now stands, not entitled to be heard, and that therefore the appeal must be dismissed.

LORD CAMPBELL. — My Lords, as I was not here in the earlier part of the discussion of this question, I shall not enter into it at any length, but content myself with saying that I quite concur with the general views of my noble and learned friends, that in the case of a person who is made a party to a suit, but who is not strictly or properly a party, there can be no ground for an appeal by him to this House against the judgment of the Court below.

LORD CHANCELLOR. — The only remaining question is as to the costs. Upon principle, I think the House would not act wisely in departing from the usual rule.

LORD BROUGHAM. — It is not a case that would regulate our general practice.

*414 * *Mr. Turner.* — Your Lordships will allow me to call your attention to the period of the cause at which the objection was taken. Your Lordships are fully aware that the matter was gone into in the Court below, and no objection was at any time taken to the insolvent being heard.

Mr. Bethell. — Your Lordships will bear in mind that the objection arising upon W. H. Rochfort's insolvency was distinctly taken in the original answer of Mrs. Browne, the respondent here, and was, no doubt, fully considered in the Court below.

LORD BROUGHAM. — You should have petitioned the Appeal Committee to refuse the appeal on account of that objection.

LORD CHANCELLOR. — The ground which my noble and learned friend has just mentioned is quite sufficient to confirm the view which I take. It is a practice very much to be discouraged that objections are not taken at an earlier stage, but that the matter should be brought to the bar of the House, and then that it should appear for the first time that there is an objection to the competency of the appellant being heard. That objection ought to have been taken at an earlier stage. It would have saved a great deal of expense, and therefore the appeal must be dismissed, without costs.

Appeal dismissed, for incompetency, without costs.

* WRIT OF ERROR.

*415

GREGORY v. DUKE OF BRUNSWICK.

1849. March 26.

BARNARD GREGORY,	<i>Plaintiff in error.</i>
THE DUKE OF BRUNSWICK and HEN. WEL-	} <i>Defendants in error.</i>
LINGTON VALLANCE,	

Practice. Writ of Error.

Where it appeared to the House that a mistake, committed by an officer of the Court below, in entering the judgment of that Court, was made the ground of a writ of error, the arguments on the writ of error brought on such judgment were stopped, and the case was ordered to stand over, to allow the parties to apply to the Court below to amend the error.

The House made this order, after referring to the report of the opinions of the Judges of the Court below, as stated in the printed reports of the decisions of that Court.

THIS was an action on the case, brought in the Court of Common Pleas to recover damages for a conspiracy to prevent the plaintiff from performing as an actor. The defendants pleaded, first, Not Guilty; secondly, that the plaintiff was not about to exercise the profession of an actor for profit and reward; thirdly, that he did not become an actor and exercise the said profession for profit; and fourthly, they justified, for that the plaintiff being editor and publisher of "The Satirist" newspaper, his appearance upon the stage was against public morals and decency. The plaintiff joined issue on the first, second, and third pleas, and demurred to the fourth plea, which, upon argument, was held bad.¹ No judgment was then entered up, as the issues of fact had not been tried. When they were tried, the jury returned a verdict for the defendants on the three issues, *416 but there was no assessment of damages as to the plea on which judgment had been given for the plaintiff on demurrer. After a motion for a new trial, judgment was entered for the defendants, and it was ordered "that the defendants do recover against the plaintiff 340*l.* 1*s.* 0*d.*, for their costs and charges by

¹ 6 Manning & Granger, 205; 6 Scott N. R. 809.

them expended about their defence, in this behalf, &c.” The case was taken, on error, to the Exchequer Chamber, and one of the grounds assigned was, “that the jury omitted to assess damages for the said Barnard Gregory, on the demurrer on which judgment was given in his favour”; another was, “that judgment ought to have been given for Barnard Gregory to recover his costs and charges upon and in respect of the said judgment given in his favour on the demurrer to the last plea, or that the said costs and charges should be deducted from the costs and charges which have been awarded to the said Duke of Brunswick and Henry W. Vallance, against the said Barnard Gregory, on the final judgment given to them as aforesaid.” The judgment of the Court of Common Pleas appeared to have been affirmed in the Court of Exchequer Chamber, being thus entered on the record, “It appeared, &c. that there is no error in the record and proceedings aforesaid, or in the giving judgment aforesaid. Therefore it is considered by the said Court of Exchequer Chamber, that the judgment aforesaid, in form aforesaid given, be in all things affirmed, and stand in full force and effect, the several matters aforesaid, above for error assigned and alleged, in any wise notwithstanding. And it is further considered by the same Court of Exchequer Chamber, that the said Duke of Brunswick and H. W. Vallance should recover against the said Barnard Gregory

66l. by the said Court of Exchequer Chamber adjudged, *417 &c. for their *damages, costs, and charges which they have sustained by reason of the delay of the execution of the judgment aforesaid, on pretence of the prosecution of the said writ of error.”

It appeared in fact that in the Court of Exchequer Chamber, the Judges, on the hearing of the writ of error, took time to consider the judgment, which was finally delivered by Mr. Baron Parke, on behalf of the whole Court. His Lordship, after adverting to supposed distinctions between writs of error brought by plaintiffs, and those brought by defendants, said,¹ “But be this as it may, the present is the case of a writ of error *by the plaintiff below*, who complains that the record is erroneous, and asks to have it reversed, and justice done to himself. If judgment is reversed simply, complete justice is not done. To do that, he must have a judgment in his favour on the demurrer; for, the

¹ 3 C. B. 481, 496; 16 Law Journal N. S. C. P. 35, 39.

costs may greatly exceed the defendants' costs of the cause. But the Court could not give that judgment, without also giving a complete judgment on every part of the record. The result must be, that the new judgment will not only be for the plaintiff for the costs on the demurrer, but for the defendants on the issues found for them." Notwithstanding this distinct declaration of the intention of the Court of Exchequer Chamber, the judgment was entered on the record as one of simple affirmance.

The present writ of error was brought to this House against the judgment as thus entered.

Mr. Manisty appeared for the plaintiff in error, and argued that the judgment of the Court below could not be sustained.

* *Mr. Stone*, for the defendants in error, said that the *418 entry of the judgment, as it now stood, was nothing but a mistake on the part of the officer of the Court. He read from the report in 3 Common Bench Reports the observations of Baron Parke in delivering the judgment of the Court of Exchequer Chamber, and contended that this mistake of the officer ought not to deprive the defendants of the benefit of the judgment really intended by the Court.

LORD BROUGHAM (interrupting the argument) said, it appeared that there had been a mere slip of the officer of the Court below in entering this judgment of affirmance, and the case ought to stand over for the parties, one or both of them (he thought both ought to join), to make an application to the Court of Exchequer Chamber to correct the entry of the judgment which, according to *Richardson v. Mellish*,¹ the Court had still the power of doing, if it should so think fit.

THE LORD CHANCELLOR and LORD CAMPBELL concurred.

*Ordered accordingly.*²

¹ 1 Clark & Finnelly, 224.

² See, on the subject of the entry of judgment by a Court of Error, *Thomson v. Mitchell*, 7 Clark & Finnelly, 664; *Mackersy v. Ramsays*, 9 Clark & Finnelly, 818; *Bourne v. Gatliff*, 11 Clark & Finnelly, 45.

1849. April 2, 23.

JAMES WORTHINGTON LIVESEY, *Appellant*.MARY CARTER LIVESEY and HARDING LIVESEY, *Respondents*.*Will. Construction. Eldest Son. Vesting.*

A testatrix gave to the eldest son of her daughter Eliza and of her husband E. L., who should be living at the time of her own decease, ten guineas, adding that she left him no larger sum, because he would have a handsome provision from the estates of her late husband and of his own father (who was still alive): And she gave the residue of her property to her executors, upon trust, as to one moiety thereof, to pay and divide the same unto and amongst all the children of her daughter Eliza, who were then in being or should be thereafter born, — except her eldest son, or such of her sons as should, by the death of an elder brother, become an eldest son, — equally to be divided amongst them, and the survivors or survivor, when the youngest should arrive at the age of twenty-one years. At the death of the testatrix, her daughter Eliza had five children, and the eldest son was provided for from the estates in the will mentioned, and he received the ten guineas, but died, without issue, before the youngest child attained twenty-one. The second, who then became an eldest son, did not succeed to the provision which had been made for the eldest son: —

Held, notwithstanding that he, being the eldest son at the time the youngest of the children attained twenty-one, was excluded from any share in the moiety of the residue.¹

THIS was an appeal from a decree of the Vice-Chancellor of England,² affirmed by Lord Chancellor Lyndhurst,³ upon the construction of the will of Jane Worthington, widow, dated the 24th of April, 1805.

* 420 *The testatrix, after bequeathing an annuity of 100*l.* to her daughter Jane, wife of Martin Livesey, for her life, for her separate use, proceeded thus: “I give unto my daughter Eliza, wife of Edmund Livesey, of, &c. the sum of ten guineas, and unto the eldest son of my said daughter and the said E. Livesey, who shall be living at my decease, ten guineas; and I leave my said daughter, and the eldest son of my said daughter Eliza and the said E. Livesey, who shall be living at my decease, no larger sum, be-

¹ See *Thellusson v. Rendlesham*, 7 House of Lords Cases, 429, 437, 472.

² 18 Simons, 33.

³ *Infra*, p. 425, note.

cause they have, and will have, a handsome provision from the estate of my late husband, and the estate of the said Edmund Livesey."

The testatrix, after other bequests, gave and bequeathed all the residue of her estates and effects, real and personal, to her executors, their heirs, executors, &c., upon trust that they, or the survivors of them, his heirs, executors, &c. should pay and divide the same in this manner : —

"One moiety or half part thereof unto and amongst all and every of the children of my daughter Jane, who may hereafter be born, she not having any at present, their heirs, executors, &c., equally to be divided amongst them and the survivors or survivor of them, share and share alike, as tenants in common and not as joint tenants, when the youngest of such children shall arrive at the age of twenty-one years. Provided always that if any such children shall then be dead, leaving lawful issue, such issue shall take the share which his, her, or their parent would have taken if living. Provided also, that if my said daughter Jane shall not have any children, or such children shall all die under the age of twenty-one years, without leaving lawful issue, then the aforesaid moiety to go to my said daughter Eliza's children, save and except her eldest son, or him who by the death of his eldest brother may become so, and the survivors or survivor of them, and their, his, or her issue, *at such time and in such shares and *421 manner as the other moiety of the aforesaid residue of my estate and effects is hereinafter directed to be paid and divided.

"And as to the other moiety or half part of the said residue of my estates and effects, real and personal, upon trust, that my said executors, or the survivors of them, &c. do and shall pay and divide the same unto and amongst all and every the children of my daughter Eliza, who are now in being or shall hereafter be born (save and except her eldest son, or such of her sons as shall, by the death of an elder brother, become an eldest son, it being my will that the son who is or shall become an eldest son shall not be entitled to take any thing under this devise or bequest), their heirs, administrators, and assigns, equally to be divided amongst them and the survivors or survivor of them, share and share alike, as tenants in common and not as joint tenants, when the youngest of them shall arrive at the age of twenty-one years. Provided always, that if any such children shall then be dead, leaving lawful issue, such issue shall take the share which his, her, or their parent would have taken if living. Provided also, that if all such children shall die under the age of twenty-one years without leaving any issue living, the said last-mentioned moiety of the aforesaid residue shall go to my daughter Jane's children, and the survivors or survivor of them, and their, his, or her issue, at such time, and in such shares and in such manner as the first-mentioned moiety of the aforesaid residue is hereinbefore directed to be divided. Provided also, that if all the children of my said daughters, except the eldest son of my daughter Eliza, or him who by the death of his elder brother become an eldest son, shall die under the age of twenty-one years, and not leave any issue living, then the whole of the said residue of my real and personal estate and

effects to go to the eldest son of my said daughter Eliza, his heirs, executors, administrators, and assigns.

And I do hereby declare it to be my will and mind, that in case all the children of my daughter Eliza, except one, who shall happen to be a daughter, shall die under the age of twenty-one years, and without leaving lawful issue, such daughter shall be considered as an eldest son of my said daughter Eliza, * 422 and shall not take any part of the residue of my real or personal * estate and effects, unless my said daughter Jane shall die without leaving any issue, or such issue shall all die under the age of twenty-one years. And it is my will and mind, that in the mean time, until the respective moiety of the aforesaid residue of my real and personal estates shall be to be divided, the rents, interest, and produce thereof shall accumulate and be added to the said moiety, and become a part thereof, and the said accumulations shall be divided and paid at the same time unto and amongst the same person or persons, and in the same manner as the aforesaid moiety are hereinbefore directed.

Provided, nevertheless, that if at the time my said daughter Eliza shall arrive at the age of forty-eight years, or will, if living, arrive at that age, or at any time afterwards, there shall not be any issue of her, or of my daughter Jane living, or being such issue, the same shall afterwards die under the age of twenty-one years, then it is my will that my said executors, or the survivor of them, &c. shall pay the rents, interest, &c. of the said residue, and of such accumulations thereto as aforesaid, which shall arise from the time when my said daughter Eliza shall attain her age of forty-eight years, or from the time when the last of such issue of my said daughters Jane and Eliza shall die, unto and between my said daughters Jane and Eliza, during their joint lives, and to the survivor of them during her life, &c.; it being my will that, in case of either of the contingencies in the last-mentioned proviso, the rents, interest, &c. of my estates shall not afterwards, during the lives of my said daughters, or the life of the survivor of them, accumulate for the benefit of those who will be entitled to the residue of my estates. Provided also, that in case all the children of my said daughters now living, or which may hereafter be born, shall happen to die before the younger of them shall attain the age of twenty-one years, and without leaving any lawful issue, then and in such case," the testatrix gave all the said residue and accumulations from the decease of the survivor of her said daughters, unto her nephew and niece, John and Jane Armstrong, and she appointed her daughter Jane, and William Clarke, banker, her executors.

* 423 * The testatrix died in 1815, leaving her said daughters, who were her only children, surviving. The will was proved by Jane Livesey, Mr. Clarke having died in the lifetime of the testatrix.

In a suit instituted in Chancery in 1822, for establishing the will, and administering the trusts thereof, several decrees and orders were made from time to time; and it was found, by the Master's last report made in 1839, that the said Jane Livesey was then seventy-one years of age, and had two children only who

attained the age of twenty-one, two more having died in infancy ; and that Eliza Livesey, the other daughter of the testatrix, had attained the age of forty-eight years in 1819, and had five children only, namely, Edmund Worthington Livesey, the eldest, who was born in 1796, and died in 1827, a bachelor ; the appellant, who was born in 1798, and became the eldest son on the death of his said brother ; Eliza A. Livesey, who was born in 1802, and died in 1820, under the age of twenty-one, unmarried ; and the two respondents, the first born in 1804, the latter in 1809.

By an order of the Vice-Chancellor, made on confirming the report, it was declared that one moiety of the residuary personal estate of the testatrix became vested in the children of Jane Livesey, and the other moiety in the children of Eliza Livesey, entitled thereto under the said will.

The respondents having, in 1840, presented a petition for distribution of the latter moiety (which exceeded 30,000*l.*) among them, to the exclusion of the appellant, he and his solicitor filed affidavits, in which it was stated that, under the will of the late husband of the said testatrix, the said Edmund W. Livesey had been entitled to an annuity of 200*l.* for his life, and to a sum * of 4000*l.* bequeathed for his benefit, as in the will * 424 mentioned, but no provision was therein made for the appellant ; that at the date of the will of the testatrix, the said Edmund Livesey had made a will, then existing, by which he devised his real estates in such manner that the appellant, his second son, would become entitled thereto, in case of the death of the eldest son without issue ; but that will was revoked by a subsequent and last will, made in 1811, whereby he disposed of the whole of his real and personal estates, subject to legacies of 1000*l.* to each of his younger children, in such manner that on the death of his eldest son, the said E. W. Livesey, and in the events that happened, the whole of them devolved on his daughter, the respondent, and her issue, to go, in default of such issue, to his own right heirs. So that no provision was made by that will for the appellant, except the legacy of 1000*l.* as a younger child.

The affidavits further stated, that the said E. W. Livesey made a will, and thereby bequeathed all his personal estate, including the said sum of 4000*l.* to his sister, the respondent, who was, or claimed to be, entitled to that sum, as well as to the real estates devised by her father's last will.

By the final decree of the Vice-Chancellor, made in the cause and on the said petition, in July, 1842, it was, among other things, declared, that upon the true construction of the said will of Jane Worthington, the appellant had, on the death of his brother Edmund, become the eldest son of Eliza Livesey, and was not entitled to any share in the residue of the estate of the said testatrix, but the moiety thereof, given among the children of Eliza Livesey,

except an eldest son, or a son taking the place of an eldest son, * 425 was divisible in equal shares among the respondents.

That decree was affirmed, on appeal, by Lord Lyndhurst, on the 6th of July, 1846.¹

¹ His Lordship, after resigning the great seal, gave out at the request of the parties a note of his judgment, a copy of which was annexed to the respondents' printed case, and was to this effect:—

The second son (the appellant) took nothing under the grandfather's will, and under the will of the father, as it stood at the date of the disposition in question, he would have taken nothing except after the death of the eldest son without issue, either male or female. As the father was still alive, the will was subject to revocation, and was in fact afterwards altered by the exclusion of the second son and the substitution of Mary Carter Livesey his sister. In the subsequent part of the will of the testatrix, a daughter is, under certain circumstances, to be considered and taken to be an eldest son. I think the Vice-Chancellor was therefore right in interpreting the expression "an eldest son" according to its ordinary sense, and without reference to the succession to property.

The question still remains to be considered, to what period the description is to be referred; whether to the death of the testatrix, or to the time when the property was to be divided among the legatees. I think, upon the true construction of the will, that the property did not vest in the children until the youngest of them attained the age of twenty-one years; and that the individual who answered the description of eldest son at that period is the person to be excluded.

In aid and confirmation of this construction, reference may be made to the clause in the will by which, in the event of all the children of the testatrix's daughter Eliza, except one who should happen to be a daughter, dying under twenty-one and without leaving lawful issue, such daughter was to be considered an eldest son of the daughter Eliza, and was not to take any part of the residue, unless Jane, the sister of Eliza, should die without leaving issue, or such issue should all die under the age of twenty-one years. It is obvious that the child who is excluded by this clause as an eldest son might not be ascertained till long after the death of the testatrix, and the whole is dependent on several contingencies. In this case, therefore, the person intended to be excluded could not be a person answering the description of eldest son at the death of the testatrix, and the description must therefore, I think, refer to the time when the fund was to be divided. If this be so in this case, the same interpretation should be given to the

Mr. Rolt and *Mr. Speed* in support of the present appeal : —

The description given by the testatrix of the eldest son of her daughter Eliza, whom she intended to exclude from any share in the residue of her estates, is not applicable to the appellant. After the bequest of ten guineas a-piece to Eliza and her eldest son, “ who shall be living at my decease,” the testatrix * adds, * 426 that she left her said daughter and “ the said eldest son ” of her and of her husband Edmund Livesey, “ who shall be living at my decease, no larger sums, because they have, and will have, a handsome provision from the estate of my late husband, and the estate of the said Edmund Livesey.” This description of the eldest son, and the reason for the exclusion of him, apply to Edmund Worthington Livesey ; he was the eldest son of Eliza and of Edmund Livesey, at the death of the testatrix ; and at the date of her * will, she knew he was handsomely provided for * 427 in the wills of his father, Edmund Livesey, and of his grandfather, the late husband of the testatrix. The appellant had no provision from the estate of his grandfather, and from his father’s estate he received only the provision of a younger child. It is apparent that the testatrix never intended to exclude an eldest son, or one who might become an eldest son, unless the reason for exclusion applied to him ; and a Court of Equity ought not to interpret the will contrary to the plain intention. If, in the very beginning of a will, a clear description is given of the person intended to be excluded from its benefits, that description should guide the Court in construing the whole will. There is here a double description of the person to be excluded : he was to be the eldest son of Eliza at the decease of the testatrix, and he was also to be the only person to receive the legacy of ten guineas, — which Edmund W. Livesey actually received. The appellant not being entitled to that legacy, or to the other provisions which the eldest son had, does not come within the reasons for exclusion ; *Bowles v. Bowles*.¹

If it should be held, upon the construction of other parts of the will, that the decease of the testatrix was not the period when the designation of an eldest son in other parts of the instrument, that is, an eldest son who should be such at the period of distribution.

It is to be observed that, though the testatrix is disposing of a residue, there is a gift over to the nephew and niece.

The appeal must be dismissed, but, upon reconsideration of the circumstances, I think, without costs.

¹ 10 Ves. 177.

son to be excluded was to be ascertained, notwithstanding the plain meaning of the words before cited, there are only two other periods, namely, the time of vesting of the residue, and the time when it was to be paid. The appellant submits that the vesting took effect at the decease of the testatrix, *Adams v. Bush*;¹ and the rule of law is, that the time of vesting is the period for * 428 ascertaining an excluded person or class * of persons, although the class may be extended so as to let in after-born persons. But although the time of payment is the period referred to, for so letting in individuals of a class, the time of vesting is the period referred to for excluding; *Lady Lincoln v. Pelham*,² *Windham v. Graham*,³ *Driver v. Frank*,⁴ *Stert v. Platel*.⁵ These cases are not affected by the judgment of Sir T. Plumer in *Matthews v. Paul*,⁶ which is not more inconsistent with them than one part of it is with the other.⁷ The general rule is, that interests under a will shall be construed to be vested, if possible rather than contingent. There is nothing in this case to prevent the vesting; on the contrary, regard being had to the form of the limitation, the interests of the younger children of Eliza ought to be construed as vested at the death of the testatrix. The direction to the trustees, "to pay and divide," constituted a complete gift, without the subsequent clause, "equally to be divided," &c. The words "pay and divide," have the same force, as regards the question of vesting, as the words "devise and bequeath" would have, where no trusts were interposed, the former words being in fact substituted for the latter, simply on account of the interposition of the trust. The words "pay and divide" denote the gift by way of trust; the words "equally to be divided among them, &c. when the youngest of them shall arrive at the age of twenty-one years," denote the actual division of the property among the children who sur- * 429 vived the testatrix, when the youngest of them attained * that age; for the attainment of that age by the youngest is not annexed as a condition precedent to the gift contained in the words "to pay and divide," but is virtually disannexed by the words, "equally to be divided."

¹ 8 Scott, 405.¹ 1 Russell, 331.² 10 Ves. 166.³ 3 Maule & Selwyn, 25; 6 Price, 41; and 8 Taunton, 468.⁴ 5 Bingham N. C. 434.⁵ 3 Swanston, 328.⁷ 3 Swanston, at pp. 329, 340; and 2 Jarman on Wills, 119, 124.

There is nothing repugnant to this construction in the limitations that follow; that in favour of the children of Jane is an alternative limitation, in respect of the intervening limitation in favour of the issue of any of Eliza's children dying before the period of division. Both the subsequent limitations are conditional in respect of the prior limitation to the children of Eliza, being intended to take effect in defeasance of the vested interest created by the prior limitation, in the event of the children dying leaving issue, or without issue, before the period of division.

Supposing, therefore, that the appellant took a vested interest in a share of the residue at the death of the testatrix, he not being then an eldest son; that was an indefeasible vested interest, except in the event of his death before the time of division; to construe it to be a vested interest, defeasible in any other event, would make it necessary to supply a whole clause, constituting a conditional limitation, which could not be supplied at law nor in equity, except in furtherance of an intention apparent on the face of the will, and not in violation of it. Besides, it is a rule of construction to hold interests once vested, indefeasible. The appellant having sustained the description in the will of a son, other than or except an eldest son, at the time of the death of the testatrix, took a vested interest in the residue at that time; *Leeming v. Sherratt*,¹ *Hunt v. Moore*,² *Browne v. Lord Kenyon*,³ * *Sturges v. Pearson*,⁴ *Phipps v. Williams*.⁵ Unless * 430 the interests were vested at the death of the testatrix, the accumulations from that time, until the youngest of the children attained the age of twenty-one, were left undisposed of.

But suppose the interests of all the children were contingent until the youngest attained twenty-one, even in that case the appellant, by the rules of construction before mentioned, would still be denoted by the same description, and would be entitled to his share in the event of his living till the youngest child attained the age of twenty-one years.

The limitation to the eldest son of Eliza in the event of all her other children dying under twenty-one, without leaving issue, shows that, in the exclusion of an eldest son, or of one who should

¹ 2 Hare, 14.

³ 3 Maddock, 410.

² 14 East, 601.

⁴ 4 Maddock, 411.

⁵ 5 Simons, 44; see also 3 Clark & Finnelly, 665; and 9 Clark & Finnelly, 583.

become an eldest son, — except in that event, and in the exclusion of a daughter, being an only surviving child, who in that case would most probably succeed to all the property under the wills of the testatrix's late husband and of Edmund Livesey, — the intention of the testatrix was to place all Eliza's children on an equality, as nearly as possible, without putting the whole property in contingency, or if there should be an only surviving child, and that child a daughter, then to place the children of the testatrix's other daughter Jane on an equality with such only surviving child of Eliza, being a daughter, as nearly as she could, without contingency, or at all events, to prevent any great disparity in point of property between the eldest son of Eliza and her other

* 431 * children, or between an only daughter and child of Eliza, and the children of her sister Jane.

The decree of the Vice-Chancellor, instead of effectuating such equalization, or preventing such disparity, agreeably to the scheme of the will, not only violates the intention of the testatrix, as expressed in the beginning of her will, and as is manifest from its general context, but contravenes all the rules of construction applicable to this case; *Peacocke v. Pares*,¹ *Lord Teynham v. Webb*,² *Duke v. Doidge*.³

Mr. Bethell and *Mr. Stinton*, for the respondents: —

The construction put upon the will by the Vice-Chancellor's decree is consistent with the intentions of the testatrix, and with the plain meaning of the words of the instrument. It is apparent that it was her intention to deal with both moieties of the residue in the same manner, except the exclusion of the eldest son of her daughter Eliza, or such of her sons as should, by the death of an elder brother, become an eldest son, before the youngest arrived at the age of twenty-one. It is true, the reason for exclusion has failed, in the events that have happened; but the words which are repeated in several clauses of the will, are too plain and unequivocal to be controlled or confined within the limits of the reason so assigned. The only gift in this case is in the direction to "pay and divide": At what period? At the period when the youngest of the children should attain twenty-one. No person can therefore take under that direction, except such of the children as were

¹ 2 Keen, 689.

² 2 Ves. Sen. 203 note.

³ 2 Ves. Sen. 198.

qualified to take at the period of payment or distribution. The testatrix has expressly declared, *that if a younger *432 son should, by the death of an elder, become and be the eldest son at the time of distribution, he should be excluded. The very event so described has happened, and although the appellant has not succeeded to the provisions which had been made for his elder brother, the exclusion of him from any share in the residue is imperative. If, in the construction of the will, the reason assigned by the testatrix for the exclusion of the eldest son for the time being may be referred to, it is plain that she believed the eldest son, *de facto*, at the time of distribution, would have sufficient provision from the estates of her late husband or of Edmund Livesey, and her belief appears, by the affidavits of the appellant and his solicitor, to have been justified.

Mr. Rolt replied.

April 23.

THE LORD CHANCELLOR. — Many ingenious arguments have been addressed to your Lordships in this case, and many authorities have been referred to, to induce you to put a construction upon the words of the will different from their obvious and natural meaning. Now those authorities which have been referred to, will all be found, and must necessarily be found, to apply to cases where the terms, which are used, are capable of two constructions, and the choice to be made is, whether you will put upon them a construction which is consistent with the intention expressed in some other provisions of the will, or whether the Court is bound to adhere to the ordinary and usual meaning of the words which are used. It is admitted, and very properly admitted, that if the words are free from doubt and ambiguity, those authorities and arguments are not applicable.

*The first question, therefore, is whether the terms *433 which are used in this will, are not so free from doubt, or so conclusive as to what the particular intention was, as to exclude the introduction of those authorities and those arguments which have been addressed to your Lordships.

The particular words are these, “and as to the other moiety, &c. of the said residue, &c. (His Lordship read the clause as above, p. 421, down to and including the proviso, “that if any such children shall then be dead, leaving lawful issue, such issue

shall take the share which his, her, or their parent would have taken if living.")

Now two periods are referred to in this clause. One applies to the children "now in being," and the other is the period when the youngest of such children now in being, or who may hereafter be born, "shall arrive at the age of twenty-one." The parties who are excluded are the eldest son existing, or such other son as by the death of an elder brother may become an eldest son. Are not these the two periods at which that event is contemplated as possible? The argument on the part of the appellant introduces a third period, which is nowhere alluded to in this clause of the will, and which is nowhere mentioned, and there is no event connected with that period at all, namely, the death of the testatrix. Now, you cannot go out of the terms of the will for the purpose of finding another period, when you have two periods, and then an event described which is to happen between the first period and the second period described in the will. The appellant was a younger son at the time of the making of the will, and at the time of the death of the testatrix; but the elder brother * 434 having died, he became an eldest son; there was * then no elder brother, and it is said that he is to take notwithstanding the testatrix has said that a son who shall become an eldest son by the death of his brother, shall not take, and that it is her will that a son who is or shall become an eldest son, shall not be entitled to take any thing under that devise or bequest. Is not that the event which she has prescribed, in which a younger son becoming an eldest son is not to take? It is in those very terms.

Now it is said that this results not only in hardship, but in absurdity, because she has, in another part of the will, stated the reason why she excludes the eldest son; that is, the eldest son living at the time of her own death. She gives small legacies of ten guineas to her daughter, and the eldest son of her daughter who shall be living at her decease, "because they have, and will have, a handsome provision from the estate of her late husband, and the estate of Edmund Livesey," he being then alive. It might, of course, be perfectly uncertain whether they would take any thing under the will of Edmund Livesey, but the provision under the will of her deceased husband, no doubt was a fact ascertained, and therefore applicable to the party being the eldest son. Now,

if that was the reason (and it may, for any thing that appears, have been her motive originally), she has not carried out that intention, and she has not, in the other parts of the will, been influenced by that motive, or if she was, she has totally mistaken the way of carrying it into effect, because then she would have excluded not any son, who might, at any time before the event described, have become an eldest son, but she would, in the terms of this last clause, have saved and excepted her eldest son (that might be her *eldest son then living), or such other *485 son as should be an eldest son at the time of her death.

That is the way she would have expressed herself if she had intended to frame these two provisions so as to exclude an eldest son who, being such eldest son, would take the provision to which she refers at the commencement of her will; but she not only abandons that in this clause, but she entirely abandons it when she comes to the daughter, for she equally makes an exclusion of an elder daughter, although that daughter would take nothing under the will of her grandfather, or might not have taken any thing under the will of the living man, Edmund Livesey. So that she has, neither in the one instance nor the other, if that was her intention, carried out that intention.

It has not been found that any cases can be referred to, in which the Court has taken the liberty of dealing with words so unambiguous as these words are. The Court can only deal with those words, where there is, on the face of the will, enough to justify the Court in saying that by the words of the will, "eldest son," meant the eldest who inherited the estate, that is synonymous with taking the estate. No doubt, there have frequently been cases in which terms have been found which the Court has thought itself at liberty to construe, — words descriptive of seniority and age, as meaning the party who takes the estate. But in this case there is nothing to lead to that conclusion, and there is nothing to justify any such conclusion, except the naked fact, which I have shown is not at all the scheme which she has worked out in other parts of the will, of giving a small legacy to the eldest son upon a certain ground which is stated, namely, the provision to which * he was or might become entitled under the will of other *486 parties. If that be the opinion of your Lordships, there is no room for any question as to the vesting, or for any other con-

struction to be put upon the will. The testatrix having used terms which are so clear and so distinct in themselves as not to leave room for doubt as to what she meant, because in that particular event which has happened, she has stated what is to take place. It may not be consistent with the intention expressed in the commencement of the will, but there being no ambiguity in the expressions which are used, I do not think your Lordships are at liberty to go into a speculation as to her intention, and to do violence to words which are so plain, upon an assumption, founded upon more or less of reason, and more or less of argument, as to what it is probable the testatrix intended.

I think the clause with regard to the daughter is of extreme importance, because there she has entirely departed from the question of provision; but there are expressions connected with that gift which are also important to be attended to, in various parts of the case. There is a direction to accumulate; the accumulation is to take place until the youngest child shall attain twenty-one, that is, until the division; during that time the matter is kept in suspense, and that is the period she had in contemplation, — “and it is my will and mind, that in the mean time, until the respective moieties of the aforesaid residue of my real and personal estates shall be to be divided, the rents, interests, and produce thereof shall accumulate and be added to the said moieties, &c.” *Vide supra*, pp. 421–2.

It does appear to me that the terms which are used by the *437 testatrix relieve this case from all doubt and *difficulty, and that your Lordships have no choice but to act upon the words which are found in this will, and that the second son becoming an eldest son before the period when the youngest child attained twenty-one, although he takes no other provision, he has by that event, according to the terms of this will, been deprived of a share of the property left by the testatrix. I therefore move your Lordships to affirm the decree appealed from, with costs.

LORD BROUGHAM. — I entirely agree with my noble and learned friend; and I have not entertained, during the argument, any doubt at all. There are many cases which have come before the Courts, both at law and in equity, in which ambiguity being found in the words used by the testator, the Court has been called upon,

more or less to speculate, and in order to come to a conclusion, and to affix a construction, it has been called upon to do that which it is always most unpleasant to do, and which is only done in cases of necessity, namely, to resort to arguments, in order to devise what may probably have been the intention, the words themselves not giving a clear indication of that intention. But that is not the case here in any way whatever. There is no such ground for going out of the will ; there is no such ambiguity existing as necessarily to compel us to have recourse to other parts of the will. There is no question here of going from the words, to ascertain what is the general intention, that is to say, to ascertain from the other parts of the will what the part in question means. We have here words which are not capable of receiving, in my humble apprehension, any other than one construction ; and therefore it would be doing the greatest * violence * 438 which could possibly be done, in reading those words, if we were to go beyond them, when there is no ambiguity to compel us to do so.

The only objection I have to make to the judgment of my noble and learned friend in the Court below, is one of a comparatively unimportant nature. I confess that, as at present advised, if I had been he, I should have dismissed the appeal from the Court below, with the costs of that appeal. My noble and learned friend thought otherwise. He affirmed the judgment appealed from before him, without costs. I do not think I should have done that ; and this is the only observation I have to offer upon the judgment, the reasons of which were very satisfactorily and very succinctly stated by my noble and learned friend, and in which, as in the reasons of my noble and learned friend on the woolsack, I entirely concur. At all events, the costs here must abide the result of this appeal, in confirming the two consecutive judgments of the Court below.

LORD CAMPBELL. — If a Court of Equity had the power of supplying the defects of a will, I should be strongly inclined to think the appellant in this case ought not to fail ; but my notion is, that it is the duty of a Court of Equity, as well as of a Court of Law, to *construe* a will, and not to make it. The Court of Equity, as well as the Court of Law, has refrained from making a will, and those cases to which Mr. Rolt has referred, when they are examined,

will, I think, all be found to resolve themselves into a question of intention, and not to go the length of supposing a defect which a testator has apparently committed. There is great hardship here, no doubt, but it seems to me that the intention of the *439 testatrix * to be gathered from the language she has employed admits of no sort of doubt. What her reasons may have been, it is not for us to inquire; she may have had no reasons, there may be no consistency in the disposition which she makes, but the disposition which she makes is clear, and admits of no sort of doubt; therefore I entirely agree with the view that has been thrown out by my noble and learned friend, and concur in the motion that the appeal be dismissed, with costs.

LORD LYNTHURST. — I am of the same opinion.

The decree was accordingly affirmed, and the appeal dismissed, with costs.

*440 *ARCHBOLD v. COMMISSIONERS OF BEQUESTS.

1849. April 24, 26.

JOHN ARCHBOLD,	<i>Appellant.</i>
The COMMISSIONERS OF CHARITABLE DONATIONS	} <i>Respondents.</i>	
AND BEQUESTS FOR IRELAND,		

Charity. Trustee. Statute. Jurisdiction. Pleading.

By the Act 7 & 8 Vict. c. 97, the power of the Commissioners of Charitable Donations and Bequests for Ireland to sue for the recovery of such donations and bequests, is expressly limited to cases where they are withheld, concealed, or misapplied; and the same, when recovered by the Commissioners, are to be, by themselves, applied to charitable uses, according to the donor's intention. And, although they obtain the sanction of the Attorney-General to their suit, as required by the said Act, they must maintain it according to the power of suing thereby given to them, and are not entitled to the general jurisdiction which the Court exercises in suits instituted by the Attorney-General.

A decree, therefore, made at the suit of the Commissioners, first, removing a testamentary trustee of a charity, on the grounds of his bankruptcy and residence abroad, but without proof of any *improper* withholding, or concealment, or misapplication of the trust property; and, secondly, directing the appointment of another trustee in his place, is wholly wrong.

Semble, that neither bankruptcy, nor occasional residence abroad, disqualifies a testamentary trustee, to whom the testator has, unconditionally, confided a large personal discretion in the administration of the trusts, together with power to appoint a receiver of the rents of the trust estates.

Where the fact of bankruptcy is not put in issue by the bill, evidence of it is not admissible at the hearing of the cause.

If a bill alleges fraud, which is not proved, and also alleges other matters, which, being proved, are grounds for a decree, the proper course is to dismiss so much of the bill as is not proved, and to give so much relief, under the circumstances, as the plaintiff may be entitled to. *Infra*, at p. 460.¹

THIS was an appeal against a decree of the present Lord Chancellor of Ireland (11 Irish Equity Reports, 187).

* Mathew Shee, late of the city of Waterford, by his will, *441 dated the 25th of May, 1832, after giving to his wife Elizabeth Shee, among other things, all his interest in certain houses in the said city, devised and bequeathed to her, for her life, several towns and lands in the will described, situated in the counties of Waterford, Kilkenny, and Wexford, subject to head rents and to the payment of two life annuities of 20*l.* each, and a sum of 50*l.* : And after the decease of his said wife, he devised and bequeathed the said several towns and lands to John Archbold (the appellant), of Waterford, his heirs, executors, administrators, and assigns, upon trust, that he and they should, as soon as conveniently might be after the decease of the testator's wife, procure, on lease or otherwise, as he or they might think most advantageous, one or more house or houses adjoining each other, in the city of Waterford, or the environs thereof, sufficiently large to lodge therein twenty poor men and twenty poor women, of sober and reputable character and habits; and on the death or removal of them, or any of them, to fill up their places with persons of a similar description; and to pay each of them every year, by two half yearly payments, the sum of 4*l.* sterling; but if the rents or produce of the said towns, lands, and premises, so devised for the purposes aforesaid, should not be found sufficient to pay the said annual sum, then that the said J. Archbold should have full power to dismiss any number of the said men and women, and to limit the admissions so as to be enabled to meet the diminished rents and income of the said devised lands, or at the discretion of him, J.

¹ See *Curson v. Belworthy*, 3 House of Lords Cases, 742; *Harrison v. Guest*, 8 House of Lords Cases, 481, 489.

Archbold, his heirs, executors, &c. to abate rateably, in equal proportions, the said annual sums so payable to each of the

* 442 said twenty * men and women, or such number thereof as he, his heirs, executors, &c. should think proper to retain or admit; it being, however, the will and desire of the testator that no greater reduction in the number of persons so retained or admitted should at any time thereafter be suffered to take place than would be annually found necessary, so as to afford, in the distribution of the annual income arising out of the rents and profits to each and every of the persons so admitted or retained, at least a sum of 3*l.* sterling, annually, payable as aforesaid, and above the rents and other necessary charges.

And the testator declared it to be his will, that the said trustee, his heirs, executors, &c. should not be liable for any loss that might happen relating to the trust, unless the same happened by his or their wilful neglect or default: And he gave them power to grant leases of any of the devised lands for twenty-one years in possession, at the full improved rent, without fines, and to apply parts of the rents and profits to repairs and improvements, and other necessary charges, and also to appoint a receiver of the rents, at such reasonable salary as they might deem proper; "giving to the said trustee, and to his heirs, executors, &c. power to use his or their own discretion in the management of the said charity, as to such matters and things as he had not particularized herein, always keeping in view the exclusive interest and benefit of the said charity, and of the poor people to be maintained and lodged therein."

The testator died in 1832, soon after the date of his will, and his widow, whom he appointed sole executrix, took out probate thereof in the same year, and entered into the receipt of the rents of the devised lands and premises.

* 443 * Mr. Archbold had been at, and previous to the testator's death, one of the directors of the Provincial Bank in Waterford, and bore a very respectable character in that city; but in the year 1834 he withdrew from the Bank at Waterford, and, a defalcation to a large amount having been discovered in the Bank funds, he was arrested on a charge, brought against him on account of the deficiency, but was discharged, and no further proceeding was taken against him. He resided on the Continent from 1834 until, on the death of Mrs. Shee, the widow of the tes-

tator, in December, 1844, when the devise became available for the charity, he returned to Waterford, for the purpose of entering on his duties of trustee under the said will. He accordingly took on himself the management of the trust property, — which then produced a rental of about 870*l.*, subject to 70*l.* head rent, — got possession of the title deeds, and appointed a receiver of the rents, but did not take any effectual steps to establish the charitable institution by the will directed.

In the course of the year 1845, in consequence of complaints made by some of the citizens of Waterford, the Commissioners of Charitable Donations and Bequests for Ireland, appointed under the Act 7 & 8 Vict. c. 97, caused a letter to be written by their secretary, requiring the appellant to inform them what steps he had taken towards execution of the trusts of the said will, and to furnish them with accounts of his receipts and disbursements in respect thereof. Several interviews took place subsequently in the same year, between the secretary and the appellant, in the course of which the latter alleged, as a reason for not having founded the charitable institution, that he sought, but did not find, suitable premises for the purpose in Waterford. He * also made proposals to the respondents, the purport of * 444 which was, as they understood them, to secure a promise of some situation for himself, as a condition of resigning the charity trusts into their hands, intimating at the same time that it was in his power to pervert the charity to political purposes.

In April, 1846, the respondents, with consent of the Attorney-General, filed their bill against the appellant,¹ therein stating among other things, the said will, and charging that upon the de-

¹ By the 12th section of the Act 7 & 8 Vict. c. 97, it is enacted, "that the said Commissioners of Charitable Donations and Bequests for Ireland may sue for the recovery of every charitable donation, devise, or bequest intended to be applied in Ireland, which shall be withheld, concealed, or misapplied, and shall apply the same, when recovered, to charitable and pious uses, according to the intention of the donor or donors; and the said commissioners shall be empowered to deduct out of all such charitable donations, devises, and bequests, as they shall recover, all the costs, charges, and expenses which they shall be put to in the suing for and recovery of the same: Provided always, that no information shall be filed, or petition presented, or other proceeding at law or in equity undertaken or prosecuted by the said commissioners, until the same shall be submitted to and allowed by her Majesty's Attorney or Solicitor-General for Ireland, and such allowance certified by him."

cease of Mrs. Shee, the testator's widow, the devised lands became available for the charitable purposes in the will mentioned, and the appellant became bound as trustee to carry into execution the charitable trusts thereby declared, but that instead of doing so, he altogether neglected his duties as such trustee. The bill further charged, that in the year 1834, the appellant, being dismissed from

his situation of Director of the Provincial Bank of Water-
 *445 ford, and being *greatly embarrassed in his affairs, absconded from Ireland, and had since resided abroad, out of the jurisdiction ; that although he returned to Ireland on the death of Mrs. Shee, he took no steps to establish the said charitable institution, but after appointing a relation, residing in Dublin, to receive the rents of the trust property, he returned to the Continent, and resided there until within three weeks of filing this bill, when he again returned to Ireland ; that notwithstanding many applications from the respondents to carry the charitable trusts into execution, he absolutely refused to do so, and converted to his own use the rents of the trust estates, and threatened to pervert the charity to improper purposes ; that the appellant was not a proper person to execute the trusts of the will for the reasons aforesaid, and because he had no residence in Waterford, or near the trust estates, so as to be able to manage them, or superintend the application of the rents and profits to the charity.

The bill prayed that the appellant might be removed from being trustee, and that it might be referred to the Master to approve of a fit person to be trustee in his place, and for consequential directions, and also an injunction against the appellant's interfering with the rents or profits of the trust estates.

The appellant, in his answer to the bill, accounting for his delay in establishing the charitable institution, said the executors of Mrs. Shee claimed to be entitled to arrears of rents of the estates and also to a proportionate part of the current gale, that accrued due subsequently to her death, and that by reason thereof, and of other outstanding claims, as well for head rents and arrears thereof, as for renewal fines and interest thereon, in respect of
 *446 parts of the estates held under Bishops' *leases, he had found it impossible to arrange the trust property without first settling those claims, and that he had made all reasonable exertions for that purpose ; that owing to the circumstance of

these claims, and that accounts thereof, properly vouched, had not been furnished to the appellant until July, 1846, he was unable, up to that time, to say what amount of funds was applicable to the purposes of the charity; that in the mean time, he had made advances out of his own monies, and came to Ireland several times, about the execution of the trust, employed an agent to collect the rents, and made every exertion for the establishment of the charitable institution. He denied that he ever converted any portion of the rents to his own use, or threatened to pervert the charitable intentions of the testator to improper purposes.

He also denied that he absconded from Ireland, or was dismissed from his situation as Director of the Provincial Bank of Waterford, or that he had not always sufficient property to meet his engagements; and he submitted his right to act in the trusts of the said will, and that the Court would not permit the express desire of the testator to be violated, nor remove the appellant as trustee, without having satisfactory proof that he committed a breach of the trust, or misapplied the funds, or otherwise misconducted himself as trustee.

Witnesses having been examined, as to the facts before mentioned as charged in the bill and denied in the answer, and also as to the appellant's bankruptcy, though not put in issue by the bill, the cause came on to be heard in May, 1847, before the Lord Chancellor of Ireland. His Lordship by his decree, dated in July of the same year, declared that the appellant ought to be removed from further acting as trustee in the receipt of the rents of the * trust property, and decreed accordingly; and ordered *447 that it be referred to the Master to appoint a proper person or persons as trustee or trustees, in place of the appellant, and that he should pay into the Bank of Ireland, to the credit of the cause, the sum of 334*l.* 9*s.* 9*d.*, which by the evidence appeared to have been received by him, or his agent, out of the rents of the trust property: And it was referred to the Master to take an account of any further receipts of such rents by the appellant, or his agent, and to appoint a fit person to be a receiver thereof for the future, and to approve of a scheme for the due application thereof, according to the trusts of the said will.

Mr. Bethell and *Mr. Walpole* for the appellant:—

There must be a total reversal of this decree, as unwarranted by the pleadings, by the evidence, and by the Act of Parliament, and irreconcilable with the just observations made by the Lord Chancellor himself while pronouncing it.¹

The respondents sought to remove the appellant from the trust, upon surmises of his intention to reside out of the jurisdiction, of being embarrassed in his affairs, of delay in the establishment of the charity, and of a fraudulent conversion to his own use of the rents and profits of the trust estates. These were the main charges in the bill; but there was no proof given of any of them; the Lord Chancellor in his judgment negatived them, and acquitted the appellant of any breach of trust, or default or unnecessary delay with regard to the establishment of the charity; and

* 448 assuming the * small amount of rents received by the appellant or his agent to be forthcoming, — which the appellant had previously offered to lodge, and did since lodge, in the Bank, to the credit of the cause, — his Lordship emphatically stated that “there was no imputation of fraud or mismanagement against him.” Yet his Lordship, resting his opinion upon contingent possibilities, upon some vague suspicions of the appellant’s bankruptcy and of his intention to reside abroad, decreed his removal from the trust.

Bankruptcy, even if it existed, was not of itself a disqualification of a trustee, especially chosen and appointed by a testator. The bill in this case never alleged or charged that the appellant was a bankrupt; it was insinuated by some of the witnesses, and urged by the respondents’ counsel in the Court below; but the fact not being put in issue by the bill, the appellant had no opportunity of explaining or rebutting it; yet the evidence on that, and other points not charged nor put in issue by the bill, was allowed to be read at the hearing, much to the prejudice of the appellant, whose counsel objected in vain to the reception of it. Not only were facts charged in the bill which failed of proof, and proofs read of facts which were not charged or alleged at all; but there was also a circumstance introduced in an interrogatory, but neither charged nor proved, which yet had, in all probability, no small effect on the mind of the learned judge. By this interrogatory, introduced

¹ A short-hand writer’s notes of the judgment were printed in the appendix to the appellant’s case; it has been since reported, in a corrected form, in 11 Irish Eq. Rep. 197.

without the slightest reason, the appellant was asked whether he had not declared his intention of opening the charitable institution for the reception of repealers, or of putting over the door the words "Repeal Asylum"? It is essential to the administration of justice to maintain the established rules of our Courts in regard to pleadings and evidence, and * a decree, made in * 449 total disregard of them, ought not to be allowed to stand.

It is not quite clear that the Court had jurisdiction to entertain this suit. By the Act 7 & 8 Vict. c. 97, under which the respondents were appointed and constituted a Corporation, their power to sue is limited, by the 12th section, to the recovery of charitable donations, devises, or bequests, "which shall be withheld, concealed, or misapplied." There was no proof in this case of any improper withholding, concealment, or misapplication of the trust property; the contrary was in fact proved by the evidence for the appellant, and admitted by the learned judge. The jurisdiction, therefore, created by the statute did not arise in this case.

The decree was made upon the grounds of the appellant having ceased to reside in Waterford, or near the trust estates, and of his having some years before been declared a bankrupt. Neither of those grounds, even if true and properly pleaded, would justify the removal of a testamentary trustee, there being no clause in the will for vacating the trust for non-residence nor for bankruptcy. The cases therefore of *Millard v. Eyre*,¹ *Lake v. De Lambert*,² *Bainbrigge v. Blair*,³ and *In re Roche*,⁴ referred to by the Lord Chancellor in his judgment, had no application to this case. The power given to the trustee to appoint an agent, and the context of the will, show that the testator did not expect the constant residence of the appellant on or near the trust estates. Admitting that in a suit properly instituted by the Attorney-General, a trustee might be removed for non-residence or bankruptcy, these are not grounds for the removal * of a trustee, at the suit of Com- * 450 missioners, whose power to sue is limited by the act appointing them to "the recovery of money withheld, concealed, or misapplied." The Attorney-General cannot be held, by giving his sanction to this suit, to be a party to it.

The decree is wrong, not only in removing the appellant from the trust, but also in referring it to the Master to approve of

¹ 2 Ves. Jun. 94.

² 1 Beavan, 495.

³ 4 Ves. 592.

⁴ 2 Drury & Warren, 287.

another person to be trustee in his place, and directing conveyances of the trust estates to the new trustee. By the 12th section of the Act, the Commissioners, where they are entitled to sue to recover charitable donations, are themselves the legal owners of the property when recovered, and the only persons entitled to apply it to charitable and pious uses. They have no authority to ask for, nor has the Court, in suits instituted by them, authority to direct the appointment of a new trustee. Even if such trustee could be legally appointed, the large powers entrusted by the testator to the personal discretion of the appellant could not be transferred to any new trustee.

There never was a decree so contradictory to the case made by the bill, to the evidence in the cause, and to the jurisdiction given by the statute. It was the duty of the learned Judge, at the hearing, to dismiss the bill, with costs, the moment he saw that it was founded on a personal charge of a fraudulent conversion of the charity property, which was not supported by a particle of proof; *Glascott v. Lang*.¹

Mr. Turner and *Mr. Schomberg* for the respondents:—

There are two questions raised in this appeal: first, whether the Lord Chancellor had jurisdiction to remove the appellant from the trust; secondly, whether a sufficient case was made *451 for his removal. A great part of the *argument urged against the decree was founded on the loose notes of the Lord Chancellor's judgment, printed in the appellant's case; but the House would look to the decree itself, and not to that judgment. The decree was to be sustained on the pleadings and proofs, though not on the reasons of the Judge as they appeared in these notes.

The facts were not sufficiently opened by the appellant's counsel, who relied more on the reasons imputed to the Judge, and on the poverty of the pleadings and of the evidence. The estates devised for the charitable institution were of great value, and the answer of the appellant admitted that the rents amounted to 870*l.* a-year. The income accrued, for the purposes of the charity, in December, 1844, when Mrs. Shee, the tenant for life, died; yet not one step or active measure was taken by the appellant for the establishment of the charity, up to the time of filing the bill in April, 1846,

¹ 2 Phillips, 310; see p. 322.

although he had been, in the mean time, in the receipt of the rents of the estates, and ought to have received 1200*l.* or 1300*l.* Was not that a withholding and misapplication of the trust money within the meaning of the statute? Complaints of delay in the establishment of the charity were from time to time addressed by the citizens of Waterford, to the Commissioners. The delay was not imputable to them, for it appeared that they, in June, 1845, directed their secretary to write to the appellant, requiring him to inform them what steps he had taken to carry into effect the benevolent intentions of the testator, and informing him that they would require him periodically to lay before them accounts of his receipts and disbursements of the proceeds of the charity property. The cause of delay assigned by the appellant was, that considerable arrears of rents were claimed by the executors * of * 452 Mrs. Shee, and that fines for renewals of leases were due to the landlord. The excuse was false, for most of the devised estates were freeholds in fee, on which no fines were payable, and on the only estate (that in Wexford) subject to fines, Mrs. Shee left due but one fine, which accrued in 1843 —

[THE LORD CHANCELLOR. — Those matters are not charged in the bill. The charges are, that he neglected and refused to establish the charity, and converted to his own use the rents received by him. The question is, whether matters are sufficiently charged in the bill to enable the defendant to repel them. You are not to raise points here, which are not put in issue by the bill.]

The appellant has, in his answer, taken grounds which are displaced by the evidence; he has not discharged them, having failed in proving what he in his answer stated to be the reason for not establishing the charitable institution. The fines due did not, as appeared in evidence, exceed 90*l.*, while the annual income of the estates exceeded 870*l.* The next reason given by the appellant for not establishing the charity was, that sufficient rents had not been received; but it was proved that he had received 334*l.*, and might, but for the neglect of himself or his agent, have received a much larger sum; so that this excuse also failed.

The allegations and charges in the bill were sufficient to sustain the decree, at least for the removal of the appellant from the trust; the bill charged, — and it was proved in the evidence, — that being dismissed from his situation of director of the Provincial Bank in 1834, and having become embarrassed in his affairs, he absconded

from the country, and had since resided abroad, out of the jurisdiction, except a few weeks, in 1844, when Mrs. Shee * 453 died, and again in 1846, * when this bill was filed. It is quite clear that it is not his intention to reside in Waterford, and without a residence there it is impossible for him to administer this charity —

[THE LORD CHANCELLOR. — According to that doctrine, the Court of Chancery, before it appoints a trustee of a charity, must ascertain whether the person proposed to be appointed intends to go abroad.]

It is submitted that a sole trustee of a charity, like this, ought to reside constantly, and continue in the active execution of the trust; the testator certainly intended that, and at the date of the will the appellant was residing, and likely to continue to reside, in Waterford, where he held a situation of great importance and respectability. It is not contended that in all cases a trustee is removable for non-residence. The necessity for residence depends on the nature of the trust, and whether there is a sole trustee or several trustees.

The power given by the Act 7 & 8 Vict. c. 97, to the Commissioners, to recover all charity property “withheld, concealed, or misapplied,” embraced every case of neglect of charitable trusts, and authorised the Commissioners to sue in all such cases; they have, in effect, a title to sue coextensive with that of the Attorney-General; and the Court, at their suit, is bound to protect all charity property which is shown to be in jeopardy.

Mr. Schomberg, in answer to an objection to his reading a piece of evidence in the cause, which was not read in the Court below, referred to a discussion on a similar objection, in the case of *Attwood v. Small*,¹ in which the cases of *Rochfort v. Nugent*,² and * *Noel v. Noel*,³ were relied on for the admissibility of the evidence.

LORD BROUGHAM, referring to the report of the discussion in *Attwood v. Small*, said, the answer of P. Taylor, which was offered in evidence on that appeal, not having been read in the Court below, was rejected, by himself and Lord Lyndhurst, after full argument by the counsel on both sides. They, on that occasion, had consideration of the cases of *Rochfort v. Nugent*, and *Noel v.*

¹ 6 Clark & Finnelly, at pp. 291 – 305. ² 12 Price, 214; see pp. 271 to 322.

³ 5 Brown P. C. at p. 354.

Noel, and his impression was that the documents in these cases, though not read in the Court below, were admitted by the House on the appeals by consent of the parties.

Mr. Schomberg referred to his Lordship's observations on the two cases in *Attwood v. Small*:¹ "Upon the whole, I think *Noel v. Noel*, and also the other cases, show that this Court, being a Court of the last resort, and having the highest judicial powers, has a right, in order to satisfy its own conscience, to *look at what was not before the Court below*," &c.

Admitting that the prayer of the bill in the present case and the decree were wrong, still he contended that it was competent to the House, in a charity case, to make a proper decree, such a decree as the Lord Chancellor of Ireland ought to have made; *Mitford*.²

Mr. Bethell, in his reply, confined his argument — by the direction of their Lordships — to the single point, whether there was a "withholding" by the appellant of the 334*l.* of rents received from the charity estates; and he submitted that there was not. From whom could * he have withheld them? The enact- * 455 ments of the statute applied to charities that were established. This was a charity to be established; there were yet no objects of the charity, and no person from whom the rents of the estates could be withheld; in truth, there were no rents to withhold, only a year and a half having elapsed from the death of the tenant for life to the time of filing the bill, and a proportion of the rent, for the current half year at her death, was claimed by her executors.

THE LORD CHANCELLOR. — This bill was filed by the Commissioners of Charitable Donations and Bequests for Ireland, against the appellant, a trustee under a will, who, after the death of the tenant for life, according to the trusts of the will, was to procure a house sufficient to receive a certain number of poor persons, who were then to be appointed to the benefit of the charity of the testator.

The bill proceeds upon the grounds of misconduct, and misapplication of the charitable funds, on the part of the appellant. It says that he, acting under the will of the testator, received

¹ 6 Clark & Finnelly, at p. 302.

² On Pleading, p. 39.

monies; that he had been dismissed from being a director of the Provincial Bank of the city of Waterford; that he became bankrupt; that he absconded; that he had misapplied the monies he had received, and threatened to misapply whatever more he might receive; and then it prays an account of those monies, the dismissal of the appellant from the trust, the appointment of another trustee, and that the appellant may be restrained from further management of the charity property.

Now two points arose, which it was necessary we should * 456 consider before we came to the last point, which * we have heard argued by Mr. Bethell in reply. The first question was with regard to the personal charges against the appellant. Having very minutely examined each of the charges during the time that the respondents' counsel were heard; and calling upon them with respect to one charge after another, to show how each was proved, and by what evidence it was established, every one of them in succession appeared to be totally unfounded. There did not appear to be any thing in the evidence to support the charges made in the bill. Attempts were made, by matters said to be in evidence, but not upon the record, which, if properly stated and properly proved, might have been grounds of objection to the conduct of the trustee; but the House are of opinion that they cannot enter into the consideration of any matter not charged; and consequently that part of the case we have rejected from our consideration. I only mention it now for the purpose of removing any impression which may have been made by the arguments at the bar, that, because this is a charity case, it is competent for the plaintiffs to introduce unfounded charges against an individual connected with the charity, and yet to sustain the bill, although those improper charges appear to be necessarily thrown out of consideration. There is no such rule; it would be very unjust if there were. The relaxation of strictness, allowed in cases of charities, has no reference to the state of the pleadings as affecting the conduct of individuals. We therefore confined the plaintiffs to what was alleged, looking to the evidence we had in support of those allegations; and that part of the case, in the opinion of the House, entirely fails.

The next question was, whether the Act establishing these

Commissioners of Charitable Donations and Bequests * did * 457 or did not extend to what the decree has dealt with, namely, whether it not only enabled them to recover trust property which had been improperly withheld, but also to go on, as the decree does, to deal with this suit as if it had been a suit on behalf of the Attorney-General, for the general administration of charity property, and the appointment of a new trustee. Now these plaintiffs have no stake, they have no interest, they have nothing but Parliamentary authority, and they must therefore show that what they have asked of the Court, and what the Court has done, is strictly within that authority, and derived from the Statute, the 7th and 8th of the Queen, under which they are appointed. That Statute gives them authority "to sue for the recovery of every charitable donation, devise, or bequest, intended to be applied in Ireland, which shall be withheld, concealed, or misapplied." That is the only authority to sue. There is a subsequent direction for the regulation of their conduct when they have got into their hands that which is the subject matter to be recovered by the suit to be instituted. Their authority to sue is confined to property "withheld, concealed, or misapplied." If the word "withheld" alone had been used, it must obviously have meant, "improperly withheld"; retained by the party having it, when he ought, under the circumstances, not to have retained it, but applied it to the charitable purposes. The word is therefore to be read, obviously as if the term in the Act had been "improperly withheld." Taking the word with the other words with which it is coupled, there is no doubt of the meaning. The words it is coupled with show the intention of the Act, which is expressed in the words "concealed or misapplied." But the word "withheld" itself would be sufficient, * considering the meaning of the enactment * 458 to be that the right to sue is only for property "improperly withheld."

We are very clearly of opinion, that in a suit instituted by the plaintiffs, and by them alone, although under the regulations of the Act they make the Attorney-General a party, yet they must maintain their suit in respect of that right of suing which the Act gives them. The Act gives them a right of suing for property "withheld, concealed, or misapplied." It does not give them a right to the jurisdiction which the Court exercises in a suit instituted by the Attorney-General. The Act does not intend that that

right is to be exercised by these Commissioners in the place of the Attorney-General, but it means to deal with them as trustees, as they are in other parts of the Act dealt with as trustees ; and when they have got the money, it directs what they are to do with it, to enable them to perform their duties in such a way as might probably be a saving of expense ; it authorises them to obtain possession of money concealed or misapplied, and when they have got it, it directs in what way they are to apply it.

But the decree pronounced in the suit instituted by these Commissioners goes a great deal further, and deals with the suit to the full extent, to which it would have been dealt with if the decree had been obtained by the Attorney-General. My opinion certainly is (and we are told that it is the first case in which the question has been raised), that that is a misapprehension of the authority given by this Act ; that it gives no such authority ; but only gives authority to institute a suit to recover possession of property “ withheld, concealed, or misapplied.”

* 459 That will dispose of the whole of the case, with the * exception of that part of the bill which alleges that the defendant had improperly withheld some money, — that he had retained money which he ought not to have retained, — but ought to have applied to the purposes of the charity. That was the only point upon which we wished for further information ; and we have had our attention directed to the evidence applying to that, the only point upon which we were desirous of having any observations made in reply. Looking at the period when this trust commenced ; looking at the position of the property ; looking at the claim to the apportionment of the rents ; and having reference to the difficulty sworn to by the witnesses in obtaining the rents, and the small sums at last obtained, without any proof that there was any neglect in not obtaining more ; and the first duty of the trustee being to procure a house, which of course could not be done until the funds realized and in hand were sufficient to enable him to do it ; it appears to me very clear that that part of the case has failed, not for want of jurisdiction, but for want of evidence ; and that there is no proof of the conduct of the appellant in this case coming sufficiently within the provisions of the Act, of his having improperly “ withheld, concealed, or misapplied ” the trust monies.

The result of that will be, that if the House concurs in the opin-

ion I have formed upon the subject, then the whole of the suit has failed, and the decree ought to be reversed, and the bill dismissed, with costs. I should have been of that opinion, even if it had not contained those allegations of misconduct. But when we find what is upon the record, it leaves no doubt of the propriety of dismissing the bill, with costs.

I must, however, observe, as an opinion of mine has been referred to (in *Glascott v. Lang*, *supra*, p. 450), to * the * 460 effect that where bills allege matters of fraud, the Court must necessarily dismiss them, because fraud is not proved; that, of course, applies to cases where all the subsequent considerations depend on questions of fraud. But if fraud be imputed, and other matters alleged, which will give the Court jurisdiction as the foundation of a decree, then the proper course is to dismiss so much of the bill as is not proved, and to give so much relief as, under the circumstances, the plaintiff may be entitled to.¹

With regard to this bill, it appears to me that every part of it is disposed of by the view I have now taken of it; and therefore I move your Lordships to reverse the decree, and dismiss the bill, with costs.

LORD BROUGHAM. — I concur in every remark that has been made, and every argument that has been urged, and in the view taken of every point that has been commented on by my noble and learned friend. I had no doubt whatever during the progress of the cause, except that I felt some hesitation on the construction of the Act of Parliament, and afterwards on the point to which the reply of Mr. Bethell was confined, with respect to the money said to be withheld.

It appears to me to be perfectly clear that the Court below has miscarried in some respects; miscarried in matter of law, as in considering that a trustee may be removed on such grounds as those which are stated, including, among others, a temporary residence in another country, without any change of domicile by permanent residence there, and including also bankruptcy (even if there had been bankruptcy here), which is no ground of itself for removing a trustee, unless in a particular * case, * 461 where, by special provision of the trust, — which is very common, as the Lord Chancellor of Ireland himself observed, —

¹ See *Hickson v. Lombard*, Law Rep. 1 H. L. at p. 327.

bankruptcy is a ground stated as a cause of removing a trustee. But generally at common law, without regard to any particular provision in the trust, either in the foundation of the charity, or in the particular deed describing the trust, bankruptcy, of itself, would be no ground for removing a trustee. Neither is there any ground here for saying that the trustee had changed his domicile by going abroad. All that the Court says with respect to domicile is, that he is in the country, he is in England or in Ireland; he is within the jurisdiction; the Court only seems to doubt whether he would remain there. That is an extraordinary application of the principle *Quia timet*, that because he may change his domicile, therefore he is to cease to be a trustee. That might have been matter for consideration in the constitution of the trust; it might have been a matter for consideration in the appointment of a trustee under any foundation; but it is not to be taken as a matter especially applicable to this case alone, which is not to be dealt with differently from other cases, but must be taken upon the general ground.

Then as to the fact of bankruptcy, there is no proof of it at all; it is negatived; so that even if the law were rightly understood by the learned Lord Chancellor of Ireland, the fact appears clear, and leaves no ground for the application of the law.

Then we come to the question of "withholding" the trust monies. The word "withholding," even if it were not in the position of coming within the rule "*noscitur ex sociis*," means something more than the mere non-payment of, than the
 *462 mere non-production of the * money; it means being misapplied; in the case of a trust it means something more than the mere non-payment, but *noscitur ex sociis*. "Misapplied," the word coupled with it, shows clearly what is meant by it; it is "withheld" in that kind of way to which "misapplied" is a stronger expression, but is also applicable.

I entirely agree, therefore, that this is a case in which there must be a total reversal. It does not appear to me that the Court below has paid sufficient attention to the law or to the facts of this case, to the pleadings, to the evidence, or to the Act of Parliament. The consequence of want of attention always is error, error more or less to be lamented, when it gives rise to great hardship; because,

although Mr. Archbold is to be recouped whatever costs he may have paid under the erroneous decree, he is brought here with charges against his character, — charges, it is true, no sooner made than abandoned ; but he is brought here to defend himself upon the whole matter, to challenge the judgment given against him in the Court below, and he comes here at his own cost ; for although we reverse the judgment of the Court below, and he, of course, is not to pay the costs incurred below, yet the rules of this House, as to costs upon a reversal, are not like the rules of other Courts of Appeal, as in the Privy Council and the Ecclesiastical Courts. In this Court we never give the costs to the party who challenges the decree, as against the party who defends the decree ; or on a writ of error, we never give the plaintiff in error his costs as against the defendant who has obtained the judgment of the Court below. Therefore it is very much to be lamented that this miscarriage of *the law to the facts of the case should have * 463 given rise to the hardship under which the appellant leaves this Court, in having its judgment completely on every point in his favour, and yet being saddled with the expense of setting the erroneous judgment right.

LORD CAMPBELL. — I am also of opinion that the decree ought to be reversed. I must confess that I had thought this Act, appointing these Charity Commissioners, had conferred much larger powers upon them. What we have to do is to look at the Act, and there I do find that the powers of the Commissioners are very limited ; for instead of having powers conferred upon them coextensive with those of the Attorney-General, I find that the only power that they have of suing, is “ for the recovery of every charitable donation, devise, or bequest, intended to be applied in Ireland, which shall be withheld, concealed, or misapplied.” Then the words which next follow, with respect to what the Commissioners have to do, remove all doubt, if there had been any, as to what their powers are, because they are “ to apply the same (that is, the money which they are seeking to recover) when recovered, to charitable and pious uses.” Therefore the right of suing is confined to sums of money which they are to receive. Consequently, as it appears to me, it is quite clear that this bill, so far as it seeks the removal of the trustee, is not authorised by the Act of Parliament, and that that part of the decree which removes the appellant from

being trustee, and appoints a new trustee, cannot possibly be sustained. It is unnecessary therefore to enter at all into the evidence as to whether those charges are supported, although, if I did so, I should concur with the observations made by my noble and learned friend on the woolsack, that they are not.

* 464 * The other point relates to the sum of 334*l.* 9*s.* 9*d.*

Now, so far as that goes, it must be clearly competent to the Commissioners to institute this proceeding, because this was a sum of money which, if they had recovered it, then they would have applied; and so far as that goes, there was jurisdiction to entertain the bill which they filed. When we look at the evidence, I think the Lord Chancellor of Ireland has come to a right conclusion upon that, because having weighed that evidence, he comes to the conclusion that there has been no improper withholding of the money. He says there has been no improper delay in establishing the charity, and as far as that goes, there is no imputation whatever upon the conduct of the appellant. In the course of Mr. Bethell's reply, it seemed to me, from what was thrown out, that this part of the decree was merely consequential upon the other part of it, by which Mr. Archbold was removed from being trustee. For if the Lord Chancellor of Ireland had not thought that he was to be removed from the office of trustee, I think there could have been no decree for payment of this money. It seems to me, therefore, that the 12th sect. of the Act gives to the Commissioners of Charitable Donations and Bequests for Ireland the power to sue when money has been withheld, but that is when it has been *improperly* withheld, — retained after it ought to have been paid over and accounted for, — and that the Lord Chancellor of Ireland has come to a right conclusion upon this, that there was no improper withholding.

I concur in the motion that has been made by my noble and learned friend on the woolsack, that the decree should be entirely reversed, and that the bill should be dismissed, with costs.

The decree was accordingly reversed, and the bill ordered to be dismissed, with costs.

* O'BRIEN AND ANOTHER v. THE QUEEN.

*465

1849. May 10, 11.

WILLIAM SMITH O'BRIEN, *Plaintiff in error.*TERENCE BELLEW MACMANUS, *Plaintiff in error.*THE QUEEN, *Defendant in error.*

High Treason. Copy of Indictment. Lists of Witnesses. Plea in Abatement. Allocutus.

An allegation upon a record that three Judges executed a commission in relation to the trials of prisoners, to try whom that commission was issued, is an affirmative allegation of their authority to perform that duty, and is not rendered uncertain by a subsequent statement that the commission was directed to them and others.

An indictment, charging a prisoner in Ireland with compassing, &c. to excite insurrection there, and to levy war, and to put the Queen to death, and charging as overt acts assembling with others, armed with weapons to excite insurrection and to levy war, is not an indictment founded on the 57 Geo. III. c. 6. Such prisoner, therefore, is not entitled, under section 4 of that Act, to the benefit of the Statutes 7 & 8 Wm. III. c. 3, and 7 Anne, c. 21, and consequently is not entitled to a copy of the indictment, and to a list of witnesses, to be delivered ten days before the trial.

The 4th section of the 57 Geo. III. c. 6, extends only to treasons made or declared by that Statute.

Quære, whether the objection for the want of such copy and list is to be raised by plea on arraignment.

The 36 Geo. III. c. 7, having been passed before the Union, did not bind Ireland. The 57 George III. c. 6, § 1, made perpetual the provisions of the 36 Geo. III. but did not extend the provisions of that Statute to Ireland.

The only effect of the 11 & 12 Vict. c. 12, was to extend to Ireland certain of the provisions of the 36 Geo. III. made perpetual by the 57 Geo. III., but not to extend thither the provisions of the 4th section of the last-mentioned Act, which was limited to treasons made or declared by that Act.

The offence of levying war against the King, declared by the 25 Edw. III. stat. 5, c. 2, is high treason in Ireland by the effect of the Irish Statute 10 Hen.

VII. c. 22, commonly called *Poyning's Act*, by which, acts which were treason in England under the Statute of Edw. III. were made treason in Ireland.¹

An *Allocutus*, whether "the justices and commissioners ought not on the premises and verdict aforesaid to proceed to judgment" against the prisoner is sufficient. The form "judgment of death," or "judgment to die," is surplusage.

¹ See *Mulcahy v. The Queen*, Law Rep. 3 H. L. at p. 318.

THESE were cases in which writs of error had been brought
 *466 upon judgments pronounced by the Court of *Queen's

Bench in Ireland against the two plaintiffs in error respectively, on charges of high treason. There had been a special commission issued into the county of Tipperary in the month of September, 1848, to try certain prisoners then in the jail of that county. The two plaintiffs in error were among those prisoners, and indictments for high treason were preferred against them.

They were tried before Lord Chief Justice Blackburne, Lord Chief Justice Doherty, and Mr. Justice Moore, three of the commissioners named in the commission.

The caption of the indictment was in each case in the following form : —

County of Tipperary, } Be it remembered, That at a Special Sessions of Oyer and
 to wit. } Terminer, and general gaol delivery holden in and for
 the county of Tipperary, at Clonmel, in the said county of Tipperary, on Thursday the 21st day of September, in the twelfth year of the reign of our Sovereign Lady Queen Victoria, and in the year of our Lord, one thousand eight hundred and forty-eight, before the Right Honourable Francis Blackburne, Chief Justice of her Majesty's Court of Chief Place in Ireland, the Right Honourable John Doherty, Chief Justice of her Majesty's Court of Common Pleas in Ireland, and the Right Honourable Richard Moore, fourth Justice of Her Majesty's Court of Chief Place in Ireland, Justices and Commissioners of our said Lady the Queen, of Oyer and Terminer, within our said county of Tipperary, nominated and appointed to inquire into, hear, and determine all, and all manner of treasons, murders, man-slaughters, burnings, felonies, robberies, crimes, contempts, offences, transgressions, evil doings, and matters and things whatsoever, by whomsoever done, committed, or perpetrated within the said county of Tipperary, as well against the peace and the common law of Ireland, as against the form and effect of any statute or statute,
 *467 utes, acts, ordinances, or provisions *theretofore made, ordained or confirmed, and also nominated and appointed, from time to time, as need should be, to deliver the gaols of our said Lady the Queen, of the said county of Tipperary, of all prisoners and malefactors therein, saving to our said Lady the Queen all amerciaments thence arising and accruing, being by virtue of a commission under letters patent of our said Lady the Queen, under the Great Seal of that part of the United Kingdom of Great Britain and Ireland called Ireland, bearing date at Dublin, the first day of September, in the twelfth year of the reign of our said Lady the Queen, to them the said Francis Blackburne, John Doherty, and Richard Moore, and others, in the said letters named, directed by the oaths of, &c. (the names of the grand jury) ; it is presented in manner following, that is to say, &c.

The indictment against O'Brien contained six¹ counts, after

¹ The first five counts charged the prisoner with the offence, at different times and places, of levying war against the Queen. The sixth count charged that the

setting forth which, the record went on to *show con- *468
 tinuances by adjournment to the 22d and 23d, and thence
 to the 28th of September, on which day it alleged that O'Brien
 was brought to the bar, and after hearing the indictment
 read, and being asked how *he would acquit himself there- *469
 of, he pleaded in abatement as follows :—

said William Smith O'Brien (and others named), being subjects, on the seven-
 teenth day of July, in the twelfth year of the reign aforesaid, and on divers
 other days, between that day and the thirtieth day of the same month of July,
 with force and arms at, &c. maliciously and traitorously among themselves, and
 together with divers other false traitors, whose names are to the said jurors
 unknown, did compass, imagine, and intend to move and excite insurrection,
 rebellion, and war against our said Lady the Queen within this realm, and to
 subvert and alter the legislature, rule, and government now duly and happily
 established within this realm, and to bring and put our said Lady the Queen to
 death, and the said compassing, imagination, invention, device, and intention, did
 then and there express, utter, and declare by divers overt acts and deeds, herein-
 after mentioned, that is to say, in order to fulfil, perfect, and bring to effect their
 most wicked treason and treasonable compassing, imagination, invention, device,
 and intention aforesaid, they, the said W. S. O'Brien, &c. as such false traitors as
 aforesaid, on the said seventeenth day of July, in the twelfth year of the reign
 aforesaid, and on divers other days between that day and the thirtieth day of the
 same month of July, with force and arms at, &c. maliciously and traitorously did
 assemble, meet, consult, and conspire amongst themselves, and together with divers
 other false traitors, whose names are to the said jurors unknown, to devise,
 arrange, and mature plans and means to stir up, raise, make and levy insurrec-
 tion, rebellion, and war against our said Lady the Queen within this realm, and
 to subvert and destroy the constitution and government of this realm, as by law
 established, and so to bring and put our said Lady the Queen to death. And
 further in order to fulfil, perfect, and bring to effect, their most wicked treason,
 and treasonable compassing, imagination, invention, device and intention afore-
 said, they the said W. S. O'Brien, &c. on the said seventeenth day of July, in
 the twelfth year of the reign aforesaid, and on divers other days between that
 day and the said thirtieth day of the same month of July, with, &c. maliciously
 and traitorously did arm themselves with, and bear and carry certain weapons,
 &c. with intent to associate themselves with divers other false traitors, armed,
 &c. whose names are to the said jurors unknown, for the purpose of raising, levy-
 ing, and making public insurrection, rebellion, and war against our said Lady the
 Queen, and of committing and perpetrating a cruel slaughter of, and amongst
 the faithful subjects of our said Lady the Queen within this realm, and to bring
 and put our said Lady the Queen to death. And further, in order to fulfil, &c." Several other overt acts were then set out, all of which consisted of attempts to
 levy war, and of levying war, by firing at the constables, and obstructing the
 marching of troops, the acts charged being in fact those which had been pre-
 viously stated in the first five counts of the indictment.

"He, the said William Smith O'Brien, says that he ought not to be compelled now to answer the same, because he saith that by the indictment aforesaid, he the said William Smith O'Brien is charged and indicted for, amongst other offences, compassing, imagining, and intending to put our Lady the Queen to death, and that by the statutable enactments in that case made and provided and now in force in this realm, every person indicted for compassing, imagining, and intending death or destruction to our Lady the Queen, is entitled to have delivered to him ten days before his trial, and in presence of two or more creditable witnesses, a copy of the indictment, and at the same time a list of the witnesses to be produced on the trial for proving the said indictment, mentioning the names, professions, and places of abode of the said witnesses. And the said William Smith O'Brien says that the indictment aforesaid was found a true bill of the jurors aforesaid on Thursday the twenty-first day of September instant; and that on the said Thursday, the twenty-first day of September instant, a copy of the said indictment was delivered to him the said William Smith O'Brien in open court, but that no list of the witnesses, or of any witnesses or witness to be produced on the trial for proving the said indictment, was then or at any time since delivered to him the said William Smith O'Brien. And the said William Smith O'Brien says that ten days have not elapsed since the delivery to him the said William Smith O'Brien of the indictment aforesaid, and this he the said William Smith O'Brien is ready to verify; wherefore he prays judgment, and that he may not be compelled now to answer the said indictment, and so forth."

The Attorney-General demurred to this plea in abatement, and the prisoner having joined in demurrer, the Court held the plea insufficient. O'Brien then pleaded, Not Guilty. The usual award of a *venire* was made, and O'Brien then challenged the array. A

plea to this challenge to the array, a replication, and a
 * 470 rejoinder * followed, and issue being joined, triers were appointed and sworn, and the triers having found against the challenge, judgment disallowing it was given. The jury panel was then called, and ten jurors were sworn, after which O'Brien challenged peremptorily twenty names, and these challenges were allowed. He then challenged a twenty-first name peremptorily, but the Attorney-General objected to this twenty-first peremptory challenge as being more than the law allowed, and the challenge was overruled. The jurors were then all sworn, and the trial having proceeded, a verdict of Guilty was taken upon each of the first five counts of the indictment, but, as to the sixth count, O'Brien was pronounced, Not Guilty. The record proceeded thus :—

"Upon which it is demanded of him, the said William Smith O'Brien, whether he now hath any thing to say for himself wherefore the said justices and commissioners ought not, upon the premises and verdict aforesaid, to proceed to judg-

ment against him the said William Smith O'Brien, for the said treasons in the said first, second, third, fourth, and fifth counts of the said indictment above specified and alleged, who nothing further says than he had before said. Whereupon all and singular the premises being seen, and by the said justices and commissioners here fully understood, it is considered and adjudged by the Court here, &c."

And sentence, in the usual form, was pronounced; such sentence being distinctly repeated as to each of the five counts on which O'Brien had been convicted. O'Brien thereupon assigned error in the Court of Queen's Bench in Ireland,¹ but judg-

¹ The errors assigned were these: That in the record and proceedings aforesaid, and also in the giving of the judgments aforesaid, there is manifest error in this, to wit, that by the record aforesaid, it appears that judgment was given upon the record aforesaid, for our said Lady the Queen; whereas by the laws of this realm judgment ought to have been given thereupon for the said William Smith O'Brien, and against our said Lady the Queen, and therefore, &c. Also, that it does not appear by the record aforesaid, that the justices aforesaid, by whom the said indictment was taken, and before whom the same was tried, were duly authorised in that behalf to take or try the same, and therefore, &c. Also, that by the record aforesaid it appears that the letters patent in said record mentioned, appointing and nominating justices and commissioners of oyer and terminer and gaol delivery for the said county of Tipperary, were directed to the justices, by whom the said indictment was taken, and others in said letters patent named, but it does not appear in or by said record that any power or jurisdiction was given to any number of the justices and commissioners, to whom the said letters patent were directed, less than the whole number of the said justices and commissioners, to take indictments, or to hear and determine the offences in said indictment charged, and yet by the record aforesaid it appears that said indictment was taken by and tried before three only of the justices and commissioners to whom the said letters patent were directed, and therefore, &c. Also, that it does not appear by the record aforesaid that the justices aforesaid, by whom the said indictment was taken, were duly or at all in manner by law required assigned to hear and determine offences within the said county of Tipperary, or to deliver the gaols of the said county, and therefore, &c. Also, that it does not appear by the record aforesaid that the said indictment was found by the jurors aforesaid a true bill by and upon the oaths and testimony of two lawful witnesses, pursuant to the statutable enactments in such case made and provided, and therefore, &c. Also, that by the record aforesaid it appears that judgment was given for our said Lady the Queen against the said William Smith O'Brien upon each and every of the first five counts of the said indictment, whereas by the laws of this realm judgment should have been given for the said William Smith O'Brien upon each of the said first five counts, each of the first five counts being insufficient in law to warrant judgment thereon for our said Lady the Queen against the said William Smith O'Brien, and therefore, &c. Also, that judgment was given for our said Lady the Queen upon the demurrer put in by her Majesty's Attorney-General to the plea pleaded by the said William Smith O'Brien on the 28th day of September

* 471 ment was given *for the crown.¹ O'Brien then brought the present writ of error.

The proceedings in the case of Macmanus were the same
 * 472 as in that of O'Brien, except that the days of * adjournment were more numerous, as O'Brien was tried first, and the adjournments were made from time to time during his trial; and also that in the assignment of errors in the Court of
 * 473 Queen's Bench in Ireland, Macmanus * did not allege that

aforesaid, whereby he the said William Smith O'Brien prayed judgment whether he should be compelled then to answer the said indictment; whereas by the laws of this realm judgment should have been given upon the said demurrer for the said William Smith O'Brien, and therefore, &c. Also, by the record aforesaid it appears that a copy of the indictment aforesaid was not delivered to him the said William Smith O'Brien ten days before his trial upon said indictment, pursuant to the statutable enactments in that behalf made and provided, and therefore, &c. Also, that by the record aforesaid it appears that no list of the witnesses, or of any witnesses or witness to be produced on the trial for proving the said indictment was delivered to him the said William Smith O'Brien ten days before his trial, upon the indictment aforesaid, pursuant to the statutable enactments in such case in that behalf made and provided, and therefore, &c. Also, that it does not appear by the record aforesaid that any precept or writ for the return of the jurors, who passed upon him the said William Smith O'Brien, was in that behalf issued to the sheriff of the said county of Tipperary, and therefore, &c. Also, that it appears by the record aforesaid that the *venire facias juratores* awarded to the sheriff of the said county of Tipperary by the justices aforesaid, was not a proper *venire facias juratores* in that behalf, and conformable to the statutable enactments in such case made and provided, and therefore, &c. Also, that by the record aforesaid it appears that the challenge of him the said William Smith O'Brien to Southcote Mansergh, one of the jurors aforesaid, who passed upon him the said William Smith O'Brien on the indictment aforesaid, was disallowed by the said justices and commissioners, whereas by the laws of this realm said last-mentioned challenge ought to have been allowed, and therefore, &c. Also, that it does not appear by the record aforesaid that the verdicts above given upon the said first five counts of the said indictment respectively, or any of them, were or was found upon the oaths and testimony of two lawful witnesses, and therefore, &c. Also, that it does not appear by the record aforesaid, that it was demanded of him the said William Smith O'Brien, in manner in like cases used and accustomed and by law required, what he had to say why execution should not be awarded against him, and therefore in that there is manifest error. There is also error in this, to wit, that the judgment aforesaid in manner and form as the same is also given, is insufficient in law, and therefore, &c. Also, that the process and proceedings aforesaid, in manner and form as the same are above set forth, are not sufficient in law to warrant the judgments aforesaid given against him the said William Smith O'Brien, and therefore, &c.

¹ 10 Irish Law Rep. 337.

he did not receive a copy of the indictment in due time, nor that a peremptory challenge made by him of more than twenty jurors had been rejected, nor that a particular challenge to an individual juror was improperly rejected.

The cases came on to be heard before Lord Cottenham (the Lord Chancellor), Lords Lyndhurst, Brougham, Campbell, and other Lords.

The Judges who were in attendance on the House were, Lord Chief Justice Wilde, Lord Chief Baron Pollock, Justices Patteson, Wightman, Cresswell, Erle, and Williams, and Barons Parke, Rolfe, and Platt.

*Sir F. Kelly, Mr. Napier, Sir Colman O'Loughlen, ** and *474 *Mr. MacMahon* appeared for Mr. Smith O'Brien, and *Mr. Segar* and *Mr. O'Callaghan* for Mr. Macmanus.

The Attorney-General, the *Attorney-General* for Ireland, *Mr. Welsby*, and *Mr. Peacock*, appeared for the Crown.

It was proposed by the counsel for the plaintiffs in error, that they should first be heard in their respective cases, that the counsel for the Crown should then be heard in answer, and that the first counsel for the plaintiffs in error should then reply, leaving open the question (which it was at that time said the Attorney-General intended to raise) as to the Attorney-General's right to a final reply on the whole case. This proposal was assented to on the other side.

THE LORD CHANCELLOR intimated that the Lords consented to this arrangement, but observed that what was now done was to be considered as done by consent, and was not to be treated as a precedent.

Sir F. Kelly and *Mr. Napier* for the plaintiff in error, William Smith O'Brien.

There are four objections to the judgment of the Court of Queen's Bench in Ireland. The first is, that by the caption, it does not appear that there was any jurisdiction in the Judges, before whom the prisoner was tried and convicted, so to try and convict him, but, on the contrary, on the true legal construction of this instrument, it appears that they had no jurisdiction. Secondly, that the plea pleaded by the prisoner, in which he claimed to have the benefit of the statutes of William and of

Anne, so far as those statutes require a copy of the indictment and a list of the witnesses to be delivered a certain time before the trial, was improperly overruled on demurrer, whereas the *475 demurrer itself *ought to have been overruled. Thirdly, that by the effect of the Irish Act, called Poyning's Act, the Statute of Edward III., regarding treasons, was not made applicable to Ireland. That objection related to the first five counts of the indictment, and if it is well founded, then there is nothing to warrant the charge of a levying of war in Ireland as an act of high treason under the Statute, and the conviction which was pronounced on those counts alone cannot be sustained. Fourthly, that the form of the *allocutus*, or entry on the record, of calling on the prisoner to say why sentence should not be passed on him, was defective for not containing the words "of death." There had been a point raised in the Court below, as to the challenge to the array, but that will not now, on behalf of the plaintiff in error, be insisted on.

As to the first point. The caption, if taken, as it must be taken, to contain a true statement of the proceeding before the Court, shows that there was no jurisdiction to try this prisoner. Whatever is necessary to show jurisdiction must be specifically expressed. This is especially so in the case of treason, where even the names of the jurors must be set forth; Williams's Saunders.¹ The commission under which the trial took place was directed to at least five persons, to three who were named on the record, and to two others. The authority given to the commissioners was therefore vested in these five. The commission did not contain any *quorum* clause, under which a smaller number than the whole would have authority to hear and determine the matters in question. The whole five persons were therefore alone entitled to exercise this authority. A *quorum* clause cannot be pre-
 *476 sumed *in a special commission. There have been commissions without it; nor can it be imported into this particular commission. But if it could, still there is nothing to show what might be the number constituting the *quorum*, whether four, or three, or two, or one. This cannot be matter of speculation, for the commission itself contains no authority as to any less number than the whole, and no argument can be drawn from the commissions of assize, for they always contain a clause giving

¹ 1 Wms. Saund. 249 a, note a.

authority to "you or any one or more of you," and consequently vest ample authority in any one of the commissioners named.

The principle applicable to this discussion cannot be disputed. It is asserted on the part of the Crown that the record cannot be contradicted. The plaintiff in error admits this; but what is the consequence? That the commission, being directed to five persons, must be executed by all of them together; for the record itself shows that to them, and not to more nor to less, had this special authority been confided. The record also shows that only three out of the five did in fact execute the commission. If so, then the trial appears to have taken place before a body not authorised to try; for the persons exercising such an authority must be shown to have received it; *The King v. Atkinson*.¹ It is not necessary for the plaintiff in error to show that the other commissioners were not there. All the five were nominated, and less than five could not lawfully exercise the special power thus confided to the whole number. This argument may be illustrated by reference to arbitrations. Suppose a case is referred, and there are two arbitrators, A. B. and C. D.; the award would recite the appointment of the two, but the moment *it *477 went on to declare that A. B. alone had taken on himself the burden of the arbitration, there would be a clear want of authority, and the award made by him alone would be bad.

It will be contended on the other side that it is consistent with the commission being directed to the three with two others, that it may have vested a separate authority in each of the commissioners. That argument cannot be supported without presuming the existence of a *quorum* clause, which cannot be presumed here. Nor is there any thing which shows that the authority thus conferred is a joint and several authority, and without such a presumption there is nothing to warrant the exercise of any, by any number less than by the whole.

The authority must not only be exercised by the proper persons, but the caption must itself show jurisdiction in those persons; Bacon's Abridgment.² It is there said that "the caption of an indictment is no part of the indictment itself, but is the style of the preamble, or return, that it is made from an inferior Court to a superior"; and "every caption of an indictment must show that it was taken before a Court which has a proper jurisdiction; and

¹ 1 Wms. Saund. 248 a, note 1.

² Indictment I.

therefore if it shows only that it was taken before J. S., steward, without showing to whom he was steward, or in what Court, it is insufficient." Other instances are there given to the same effect.

The particularity with which a caption must be framed is *478 shown by Lord Coke,¹ and by Hawkins² and Hale;³ * by the last of whom the distinction is clearly taken between the caption of an indictment preferred before a general Court of Quarter Sessions, where there is a general authority to determine by law, and a caption in a proceeding under an Act of Parliament, or other special authority, where the particular authority must be shown, in order to warrant the proceeding.

The precedents which are to be found in Lord Coke,⁴ in the reports of *Layer's Case*,⁵ and of *The King v. Cellers*,⁶ establish both the rule and the distinction as already stated. The case of *Barton v. Sadock*⁷ is a strong authority to the same effect. There "upon the return of a commission to certify the Court of some proceedings, the case appeared to be this: the writ was directed unto eight *nominatim*; seven of them only certified, and whether this was good or not was the question." The case was fully argued, and the report goes on thus: "Yelverton and Williams, justices, and the whole Court agreed with them herein, that the power here given to the eight persons named in the writ, is a joint power, and not a several, and so ought to be pursued by them in their return; and the same is not to be otherwise, unless it is so set down and specified, and showed, in certain, their power to be joint and several, otherwise it shall not be so construed to be joint and several, but only joint, and so it is here in this principal case, the writ being directed to eight, and seven of them only make the return, this return is not good, and so was the opinion of *479 the whole Court * clearly. 'Fleming C. J. — If a writ of *diem clausit extremum* be directed unto three, and be executed but by two of them (unless it be expressed specially in the writ that the same may be executed by them all three, or by any two of them), this is not good, and so it shall be in all such special commissions; they ought to be specially executed according to the commission to them directed, and they are not to vary at all from

¹ 4 Inst. c. 28, pp. 162 and 164.

² 2 Hawk. P. C. c. 25, § 121.

³ 2 Hale P. C. ch. 23, pp. 166, 167.

⁴ 4 Inst. ch. 28, 162.

⁵ Foster's Cr. Law, 3, 4.

⁶ 1 Siderfin, 367.

⁷ 1 Bulstrode, at p. 105.

it.' And so, in this principal case, the whole Court agreed clearly that the return here made by seven, the writ being directed unto eight, is no good return, but all the eight ought to have joined in this return." The rule thus stated must govern the present case, and the distinction already noticed does but enforce the rule where the authority given is specially created.

Then as to the second matter of error. The prisoner was entitled by certain statutes to the delivery to him of a copy of the whole indictment, and a list of the witnesses, ten days before the trial. He did receive a copy of the indictment, but only five, and not ten days before the trial, and he did not receive any list of witnesses whatever. He has therefore been unduly tried, and the judgment against him must consequently be reversed.

This objection divides itself into two branches : first, whether the Statutes 7 & 8 Wm. III. c. 3, and 7 Anne, c. 21, apply to Ireland, and next, whether the objection was properly raised by plea in the Court below. As to the first, the 7 & 8 Wm. III. c. 3, § 1, enacts that persons indicted for high treason shall have a copy of the indictment, five days before the trial. The 7 Anne, c. 21, § 11, extending and enlarging the provisions of that statute, gave to such persons the right to have delivered to them a list of witnesses intended to be produced * in support of the charge, * 480 and also a copy of the indictment, the two things to be delivered at the same time, and ten days before the trial.

As these statutes give certain advantages to persons accused of treason, it is necessary to see what were treasons in Ireland. On that subject, the general effect of the statutes is this: The 25 Edw. III. stat. 5, c. 2, declares, among other things, that it shall be high treason "when a man doth compass or imagine the death of our Lord the King, or of our Lady his Queen, or of their eldest son and heir, or if a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere."

The 36 Geo. III. c. 7, for the first time constituted certain acts, the chief of which was any attempt against the person of the Sovereign, to be treason. That statute was intended to continue only for a limited period, but it was made perpetual by the 57 Geo. III. c. 6, on the fourth section of which,¹ the objection now

¹ 57 Geo. III. c. 6, § 4, enacts, That all and every person and persons that shall at any time be accused, or indicted, or prosecuted for any offence made or

* 481 * raised mainly depends. By that statute, which was passed after the Union, all persons indicted for treason are to have the benefit of the Statutes of Wm. III. and of Anne, except in cases of direct attempts of assassination or bodily mischief against the reigning Sovereign. The question therefore arises whether the provisions of this Act extend to Ireland or not.

Upon that question it is material to refer to the provisions * 482 of the 11 & 12 Vict. c. 12,¹ by which it is declared * (§ 1) that the provisions of the 36 Geo. III. c. 7, and 57 Geo.

declared to be high treason by this Act, shall be entitled to the benefit of the Act made in the seventh year of his late Majesty King William the Third, entitled "An Act for regulating of Trials in cases of Treason and Misprision of Treason," and also the provisions made by another Act, passed in the seventh year of her late Majesty Queen Anne, entitled "An Act for improving the Union of the two Kingdoms," save and except in cases of high treason in compassing or imagining the death of any heir or successor of his Majesty, or the death of his Royal Highness the Prince Regent, and of misprision of such treason, where the overt act or overt acts of such treason which shall be alleged in the indictment for such offence shall be assassination or killing of any heir or successor of his Majesty, or assassination or killing of his Royal Highness the Prince Regent, or of any direct attempt against the life of any heir or successor of his Majesty, or any such attempt against the life of the Prince Regent, or any direct attempt against the person of any heir or successor of his Majesty, or against the person of the Prince Regent, whereby the life of such heir or successor, or the life of the Prince Regent, may be endangered, or the person of such heir or successor, or of the Prince Regent, may suffer bodily harm.

¹ 11 & 12 Vict. c. 12, § 1, recites the 36 Geo. III. c. 7, and the 57 Geo. III. c. 6, and that there is a doubt whether the provisions of the former Act, made perpetual by the latter, extend to Ireland; and that it is expedient to repeal all such provisions of these Acts as do not relate to offences against the person of the Sovereign, and to enact "other provisions instead thereof, applicable to all parts of the United Kingdom, and to extend to Ireland such of the provisions of the said Acts as are not hereby repealed"; and it then proceeds to enact, "That from and after the passing of this Act, the provisions of the 36 Geo. III. c. 7, made perpetual by the 57 Geo. III. c. 6, and all the provisions of the last-mentioned Act in relation thereto, save such of the same respectively as relate to the compassing, imagining, inventing, devising, or intending death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of the heirs and successors of his said Majesty King George the Third, and the expressing, uttering, or declaring of such compassings, imaginations, inventions, devices, or intentions, or any of them, shall be, and the same are hereby repealed."

The 2d section enacts, "That such of the said recited provisions, made perpetual by the said Act of the 57 Geo. III. as are not hereby repealed, shall extend to and be in force in that part of the United Kingdom called Ireland."

III. c. 6, except so far as relates to attempts upon the person of the Sovereign, shall be repealed, but which also goes on (§ 2) to declare that such parts of those statutes as are not repealed shall extend to Ireland. The last statute must be construed as a declaratory act, and therefore as settling the question ; for it extends to Ireland Acts which create certain treasons, and among them is that of compassing the Queen's death. Here then the fourth section of the 57 Geo. III. c. 6, becomes applicable, and the prisoner having been indicted on the sixth count of the indictment for compassing and imagining to excite insurrection, and levy war against the Queen within the realm, and to alter the legislature, and to bring the Queen to death, which compassings were declared and manifested by certain overt acts, it is clear that he was indicted for an offence under that part of the 57 Geo. III. which was not repealed, and to the trial of which, therefore, the rules laid down in that statute, as to the copy of the indictment and the list of witnesses, became applicable. If so, then, having been tried not in conformity with those rules, but in violation of them, the trial was bad, and the judgment given on the verdict must be arrested. It will perhaps be contended that these English Acts do not apply to Ireland, because * there is an Irish Act¹ * 483 which gives similar rights to prisoners, and which therefore rendered the application of the English unnecessary. Such an argument cannot be maintained. The Irish Act gives smaller advantages than the English Act to the prisoner ; and it can no more be pretended that the Irish Act prevents the operation of the English Act than it could be pretended that the Statute of William, which gave only a copy of the indictment five days before trial, prevented the operation of the Statute of Anne, which gives a right to a copy of the indictment and to a list of the witnesses, ten days

¹ 5 Geo. III. c. 21, by which it is enacted, That after the 1st August, 1766, "all and every person who shall be accused and indicted for high treason under the said statute" (25 Edw. III.) "shall have a true copy of the whole indictment delivered to them, or any of them, on request, five days at least before he or they shall be tried for the same ; whereby to enable them or any of them respectively, to advise with counsel thereon to plead and make their defence, his or their attorney or attorneys, agent or agents, requiring the same, and paying the officer 2s. 6d. for such copy, and no more."

The second section gave to "every person so accused or indicted, arraigned or tried, for any such offence as aforesaid," the right to make a defence by counsel.

before trial. Nor is any argument, derived from the decision in *Frost's Case*, capable of being urged here against the prisoner; for in that case all that was done was done before the time required by the statute; and therefore the prisoner had received a greater, and not, as here, a less advantage than the statute intended for him.

Then comes the second branch of the objection, namely, the question whether the objection, if the prisoner was entitled * 484 to make it at all, was properly * put on the record in the form of a plea. The statutes which have been before cited as giving the right, must again be referred to, and, for the purpose of showing that the proper course has been adopted in enforcing it, must be assumed to apply to this case. It was impossible for the prisoner to take the objection at an earlier period. In *Frost's Case*¹ the Judges held that the prisoner was entitled to what he claimed, but they also held that the delay in claiming it prevented him from taking the objection as to the statutes not having been complied with; the fact being that the objection as to the non-delivery of the indictment and of the list of witnesses was not taken till the Attorney-General was about to open the case for the prosecution. In one respect the decision there is incomplete. It shows that the objection should not be postponed to so late a period; but in consequence of the tribunal before which the case was argued not being an open Court, where the Judges state their opinions and their reasons, it is not known at what period of the proceedings it was considered that the objection ought to have been taken. That question must therefore be determined by the ordinary rules of legal analogy, all of which are in favour of this objection being made by a plea in abatement. The prisoner could not know till he received the formal intimation from the officer of the Court that the grand jury had found a true bill against him. Foster, in his *Crown Law*,² seems to point out the rule as to the time when such an objection should be made. It is that which has been adopted here. Speaking of the Statute 7 Anne, c. 21, he * 485 says, "Though the Act mentioneth * only the copy of the indictment, yet the prisoner ought to have a copy of the caption delivered to him with the indictment, for this in many

¹ Mr. Gurney's Report (Saunders & Benning, 1840), pp. 56, 72, 77, 774, 778.

² Tit. Of High Treason, c. 3, § 6, p. 229, 2d & 3d ed.

cases is as necessary to enable him to conduct himself in pleading, as the other. This is now the constant practice. But if the prisoner pleadeth without a copy of the caption, as some of the assassins did, he is too late to make that objection, or indeed any other objection that turneth upon a defect in the copy; for by pleading he admitteth that he hath had a copy sufficient for the purposes intended by the Act." And he goes on to say of the delivery of the copy, that it must be exclusive of the day of the delivery and of the day of arraignment. It is clear that the prisoner could not plead till the arraignment, and therefore that he ought not to defer pleading on this matter till after that time. If, consequently, he was entitled to make this objection at all, — about which there is now no doubt, — and was entitled to make it the subject of a plea, the time of arraignment was the proper time for pleading it.

The only remaining question on this part of the case is, whether the prisoner could make this objection the subject of a plea at all. It is submitted that he could. This was properly a dilatory plea, which, in criminal matters, is the same as a suspensatory plea in civil matters. It is not a plea to the merits, nor a plea in bar, which would put an end to the indictment: it is a plea by reason of something which is matter of law, showing that the prisoner is not bound to answer at that time. The old practice of the parol demurring is precisely the same as this dilatory plea. A plea of excommunication, under the old law, was of the same kind. It was not a complete bar to the proceeding, but suspended it till letters of absolution had been obtained. * In Stephen * 486 on Pleading,¹ the definition of this kind of plea is thus given: "A plea in suspension of the action is one which shows some ground for not proceeding in the suit at the present period, and prays that the pleading may be stayed until that ground be removed." In Starkie on Criminal Pleading,² it is said, "The prisoner being brought to the bar and arraigned, either stands mute or confesses the charge, or answers in one of the following ways: first, by a plea to the jurisdiction; secondly, by a declinatory plea; thirdly, by a plea in abatement of the indictment for some defect contained in it; fourthly, by demurrer; fifthly, by a plea in bar; or, sixthly, by the general plea that he is not guilty."

[LORD CAMPBELL. — Do you contend that an objection of this sort may be made either by motion or by plea?]

¹ Ch. 1, p. 68, 1st ed.; and p. 47, 3d ed.

² Vol. I. c. 19, p. 310.

If necessary, it might be contended that the objection could be made in either way. But that question does not arise here. The great distinction which divides the administration of the criminal law from that of the law civil, is, that matters of this sort are, in the former, often dealt with on motion, and are not put on the record. But these matters of law, whether by statute or common law, may likewise be the subject of a plea, and so be put on record. An objection to the jury, or a challenge, which is matter of law, would properly, under the old law, have taken place *ore tenus*. The law has given the prisoner this right; he cannot lawfully be put on his trial without having the benefit of it; and he

may claim that benefit by plea declinatory. Rules of practice cannot deprive a prisoner of this right. It is not because the Judges of a Court have absolute jurisdiction over mere matters of practice that they can defeat a legal right, by treating it as a matter of practice. Thus, they could not by any rule declaratory of practice, say that a trial should not take place before twelve, but before six or any smaller number of jurymen. Mr. Starkie says,¹ "Declinatory pleas were of two kinds; first, the plea of privilege of sanctuary, claimed under certain restrictions, protection from process, and a right of being remanded if taken against his will, without being compelled to answer in any Court of justice. This privilege was abolished in the reign of James I." But, while it lasted, this was the rule as to the mode of enforcing it. The same rule must apply here. Try this matter by the illustration of pleading the non-delivery of an attorney's bill. The statute does not say that that defence shall be pleaded, but simply declares that the party to be charged shall be entitled to a signed bill of costs. When the question first arose on the statute, in the case of *Brooks v. Hayne*,² the matter was pleaded, and there was a demurrer to the plea; but the plea was held good. It would be a substantive grievance to make this right of the prisoner depend on the opinion of the Judges whether he was in time or not in taking the objection, instead of allowing him to take it at a fixed time, namely, at that of arraignment, by putting in a plea in abatement. The plea here is good in that respect.

There was an objection taken by the counsel for the Crown in the Court below, that, supposing the plea to be good, and properly pleaded in all other respects, it was bad as being pleaded to

¹ Criminal Pleading, Vol. I. c. 19, p. 311.

² 3 Salkeld, 19.

the whole indictment, the *sixth count alone being that *488 to which the objection could be applicable. The sixth count charged the offence of compassing the death of the Queen ; the other counts were for levying war, and under them the prisoner would not have been entitled to a copy of the indictment and a list of the witnesses, but on the sixth count he was entitled to these benefits, and it was contended that as the plea was a plea pleaded as if to the whole indictment, and not to the sixth count alone, it was bad. That argument is founded on a fallacy. The plea is not in bar of the charge, but in delay of the trial, and consequently could not be applied to some only of the counts of the indictment, but was in delay of the trial of all of them.

It is clear, that on a prosecution of this kind in England, the prisoners would be entitled to the advantage sought to be obtained for him in this case. The object of the legislature in passing the Statute of 11 & 12 Vict. c. 12, was to render the law in the two countries the same in this respect. That object has been defeated by a misconstruction of the statute, and the trial and judgment must be treated as erroneous.

The next objection is, that the charge contained in the first five counts, for levying war against the government, on which alone the plaintiff has been found guilty, is one which is not punishable under the Act of Parliament under which this prosecution has been instituted. It is not an offence which he could commit in Ireland. The first statute declaring the offence of levying war against the King to be an offence punishable as high treason, is that of 25 Edw. III. stat. 5, c. 2,¹ which, by an Irish statute, 10 Hen. VII. c. 22, *commonly known as Poyning's *489 law, is said to have been made part of the law of Ireland.²

¹ By which among other things, it is enacted, "That when a man doth compass or imagine the death of our Lord the King, or of our Lady his Queen, or of their eldest son and heir, or if a man do levy war against our Lord the King, in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and thereof be probably [provably] attainted of open deed by the people of their condition."

² The 10 Hen. VII. c. 22, is in the following terms: "There are divers good and profitable statutes made in the realm of England, whereby the said realm is ordered and brought to great prosperity, and by all likelihood, so will this land, if the said statutes were used and executed in the same: It is enacted, that all statutes of late made within the said realm, concerning and belonging to the public weal, shall from henceforth be deemed good and effectual in the law, and,

It may be admitted that the Statute of Edw. III. was transferred to Ireland by Poyning's law, but still the offence therein described, as levying war against the King, is not one of a character which, under that description, is capable of being committed in Ireland. The words of the Statute of Edw. III. are, "levy war against the King in his realm"; but Poyning's Act does not say that such an offence may be committed in Ireland, or being committed elsewhere, may be tried there. Till the time of Henry VIII. Ireland was always described as "his land of Ireland," the word "realm" being confined to England. That is the meaning which must be put upon the Acts of 25 Edw. III. and on Poyning's law, *490 construing them together, and the correctness *of so restricting the language, is shown by the subsequent phrase, in the Statute of Edw. III., which positively marks the distinction now contended for, "or be adherent to the King's enemies, in the realm or elsewhere." Ireland might possibly come in that statute under the word "elsewhere," but certainly not under the word "realm," and if so, then as this prisoner has not been charged with being adherent to the King's enemies in the realm, and as the levying war is not in the Statute of Edw. III. connected with the phrase, "or elsewhere," the indictment cannot be supported.

The last objection is, that which relates to the form of the *allocutus*. The words used are "proceed to judgment against him." The form has invariably been "judgment of death," and a departure from that form constitutes error in the proceedings. The non-observance of this form might make a difference in pleading a pardon. Suppose the Queen had issued a pardon to all persons found guilty of treason, and sentenced for such treason at Clonmel. The record here would not show that the prisoner was within the terms of that pardon. The cases of *The King v. Walcot*,¹ and *The King v. Hampden*,² and *The King v. Gerrard*,³ show that such was the form in ancient times, and there has been nothing to authorise a departure from those precedents, which have indeed been invariably followed ever since.

over that, be accepted, used, and executed in this land of Ireland, in all points and at all times, according to the tenor and effect of the same, and over that, by authority aforesaid, that they and every of them be authorised, proved, and confirmed in this land."

¹ 4 Mod. 395.

² 1 Tremaine Pl. Cor. 38.

³ 1 Tremaine Pl. Cor. 37.

Mr. Segar and *Mr. O'Callaghan* afterwards addressed the House for *Mr. Macmanus*. At the conclusion of their arguments—

*THE LORD CHANCELLOR said: My Lords, I have had a * 491 communication from the Judges, which I think right to state to your Lordships, in order that you may determine what course you will pursue under the circumstances. The Judges having heard all the arguments which have been adduced by the counsel for the plaintiffs in error in these two cases, are unanimously of opinion that the writs of error cannot be maintained, and that the judgment of the Court below on each of these cases ought to be affirmed. That is entirely in conformity with my own opinion, so that unless any difference of opinion should exist among your Lordships, it does not appear that we can, with any advantage, proceed further with the hearing of these cases. I am, of course, only stating my opinion as to the course which should be pursued, and your Lordships will determine whether you adopt that opinion or not.

LORD LYNTHURST, LORD BROUGHAM, and LORD CAMPBELL severally expressed their concurrence with the Lord Chancellor.

THE LORD CHANCELLOR. — Then the course will be to request the learned Judges to state the grounds of their opinion. For this purpose I will put a question to them. His Lordship then proposed the following question to the Judges: "Whether the plaintiffs in error have sustained the errors assigned?"

The question was agreed to.

The Judges requested time to draw up their answer. The request was granted, and the Judges withdrew from the House for nearly an hour. On their return, —

*LORD CHIEF JUSTICE WILDE delivered their opinion in * 492 the following terms: —

My Lords,— I am authorised by the learned Judges to report their unanimous opinion that the errors assigned have not been maintained by the arguments urged at your Lordships' bar.

As to the first objection: —

The Judges are of opinion that the allegation upon the record, that the three Judges who executed the commission in relation to

the trials of the several plaintiffs in error were nominated and appointed to execute that commission, is an affirmative allegation of their authority to perform that duty, and that it is in no respect rendered uncertain or ambiguous by the subsequent statement, that the commission by which they were so authorised, nominated, and appointed was directed to them and others.

The second objection involves two points : —

1st, Whether the plaintiffs in error, in respect of the 6th count of the indictment, were entitled to have a copy of the indictment, a list of the witnesses, and a list of the jury, ten days before the trial, under the provisions of the Statute of William III. and the Statute of Anne.

2dly, Whether, if they were so entitled, the objection founded upon the non-compliance with the provisions of these statutes was matter properly urged by plea.

The Judges are of opinion that the plaintiffs in error were not entitled to have delivered to them the lists and copy referred to in the error assigned in that respect, and therefore it becomes unnecessary to consider whether the objection was properly

* 493 urged by * plea. The right of the plaintiffs in error to be furnished with the copy of the indictment and the lists referred to has been endeavoured to be sustained by the counsel for the plaintiffs in error at the bar upon two grounds : —

1st, Upon the ground that the Statute of the 36th Geo. III. cap. 7, extended to Ireland ;

2dly, Or that if that statute did not originally extend to Ireland, it was afterwards so extended by the operation of the 57th Geo. III. c. 6, and by the 11th & 12th Vict. c. 12.

The Judges are of opinion that neither of these grounds can be supported.

The Statute of 36th Geo. III. passed before the union, and did not bind Ireland, and therefore if it has any application to Ireland, it must be by the effect of 57th Geo. III. or 11th & 12th Victoria.

The first section of 36th Geo. III. cap. 7, enacted, that certain acts done during the life of his Majesty Geo. III. and until the end of the next session of Parliament after a demise of the crown, should be deemed treason ; and the first section of the 57th Geo. III. c. 6, made those provisions perpetual, but did not extend the operation of the Statute of the 36th Geo. III. to Ireland.

The 4th section of 57th Geo. III. cap. 6, has been principally

relied upon, which expressly gives the benefit of the 7th & 8th William III. and the 7th Anne, cap. 21, to persons accused of any treason made or declared by that Act of the 57th Geo. III. and it is enough to say that the charge in the 6th count is not for any treason made or declared by that statute.

With regard to the Statute of the 11th & 12th Vict. the only effect of that statute was to extend to Ireland certain of the provisions of the 36th Geo. III. *made perpetual by the * 494 57th Geo. III.; and the 4th sec. of the 57th Geo. III. which has been relied upon, is limited to treasons made or declared by that Act, and the treason which is the subject of the 6th count was not one of them, and to which therefore it does not apply.

As to the objection, that the counts charging the levying of the war in Ireland do not charge an offence which in point of law amounts to treason: —

This objection depends upon the construction of the Statute of Henry VII. passing by the name of Poyning's Law.

By that statute we think that those acts which were treason in England by the Statute of Edw. III. were made treason in Ireland, if committed there, and we cannot deem it necessary to say more upon the subject than that the terms of the statute admit of no doubt.

As to the objection to the *Allocutus*, we think it is the proper form.

All that the prisoner in that stage of the proceedings can properly be asked is, what he has to say why judgment should not be pronounced; and as to precedents which go further, we deem the matter beyond the question stated to be surplusage.

The only remaining error assigned refers to the challenge to the jury. That error has not been urged at your Lordships' bar, and we think it was very properly abandoned, as the question is not open to any doubt, the language of the Statute of 9 Geo. IV. c. 54, § 9, being clear and unambiguous.¹

"The Judges have not thought it necessary to trouble your Lordships with a more detailed statement of their reasons for the opinions they entertain, as the general *assign- * 495 ments of error have been so fully and ably and satisfactorily discussed by the learned Judges of the Court of Queen's Bench in Ireland, and which arguments are before your Lordships.

¹ See *Gray v. The Queen*, 11 Clark & Finnelly, 427.

THE LORD CHANCELLOR. — Your Lordships having now heard the grounds of the opinion of the learned Judges, those learned Judges concurring unanimously in the judgment pronounced in the Court below, I do not apprehend that your Lordships will feel any difficulty in coming to the same conclusion as that at which those learned Judges have arrived.

In my own mind, indeed, my Lords, I have never had any doubts, from the time when I first read these papers, as to the result of these writs of error. The reasons assigned by the learned Judges in Ireland, who certainly have most learnedly and most elaborately, and in a manner highly creditable to them, investigated the several grounds upon which the plaintiffs in error rely, leave no doubt as to the correctness of their decision. They properly considered the importance of the subject which they had under their consideration, and their judgments, when carefully perused, leave not any doubt upon the mind of any lawyer as to the soundness of their conclusion. We have now, however, had a confirmation of those reasons in the opinions of the learned Judges who have assisted us in considering the cases now before the House; and if your Lordships concur in the opinion which I have formed, you will affirm the judgments of the Court below.

I therefore move your Lordships, on these grounds, that judgment be given for the Defendant in Error in each of the cases under consideration.

*496 * LORD LYNDHURST. — My Lords, I am of the same opinion as my noble and learned friend who has just addressed your Lordships.

LORD BROUGHAM. — My Lords, I entirely agree with my noble and learned friend, that the judgment ought to be given for the Defendant in Error.

I cannot express my entire concurrence, without adding my tribute of respectful commendation of the great learning and distinguished ability with which the learned Judges in Ireland have dealt with the whole of this important matter. I never, in the course of my experience, read a more able and satisfactory argument, in every respect, than that of Chief Justice Blackburne; and the other learned Judges have all, in my opinion, distinguished

themselves by their ability and their learning, and their careful and elaborate consideration of these cases.

LORD CAMPBELL. — My Lords, I cannot abstain from expressing my approbation and admiration of the very able manner in which these questions have been treated by the Lord Chief Justice of Ireland, and the other learned Judges of the Court below. I have only further to add, that I entirely concur with my noble and learned friend on the woolsack in the opinion which he has expressed.

Judgment for the defendant in error.

1849. June 12, 13, 16.

ADAM BURNES,	<i>Appellant.</i>
WILLIAM PENNELL and others, Assignees and Cred-	}						<i>Respondents.</i>
itors of the FORTH MARINE INSURANCE COMPANY,							

*Fraudulent Representations. Joint Stock Company. Partner.
Law Agent. Conspiracy. Indictment.*

Two actions were brought in Scotland, both arising out of the same cause.

They were conjoined. The Lord Ordinary pronounced a judgment, which, in point of form, applied to one only, but which, in substance, affected both. His judgment was appealed against to the Court of Session, which made a decree, disposing, in form as well as substance, of both actions: —

Held, that a decree, so made, was correct.¹

By the deed of copartnership of a joint stock company, certain forms were to be observed by any transferee of shares, before he could become a member of the company. A. purchased shares, and executed some of the acts required to constitute him a member of the company; but left one of these acts unexecuted: *Held*, that the execution of these acts was a duty cast on the purchaser for the benefit of the company, and that his non-execution of one of them did not enable him, as respected the company, to retire from his contract.

A Joint Stock Marine Insurance Company had declared dividends, which, as it afterwards appeared, were not warranted by the real condition of the company. The law-agent of the company, who was also a member of it, when applied to for information, mentioned these dividends as proofs of the flourishing state of the company. The person to whom he so mentioned them became afterwards a purchaser of shares: —

¹ See *Bain v. Whitehaven Railway Company*, 3 House of Lords Cases, 2, 7.

Held, that he could not relieve himself from his contract on account of these representations.

Held, also, that the law-agent of the company was not its agent to bind it in such matters; nor could he bind it as a partner, for a joint stock company is not, like an ordinary partnership, bound by the acts of any individual member of it.

If the directors of a company agree to publish false statements of the affairs of the company, under such circumstances as show a fraudulent intent to deceive, they are not only civilly liable to those whom they have deceived and injured, but may be criminally prosecuted, and punished.¹

THE appellant in this case had been sued by the representative of the Forth Marine Insurance Company * (which by a private Act, 5 & 6 Vict. c. 99, was allowed to sue and be sued by its officer), for calls due to that company, and he had himself instituted a suit against the representatives of that company for the reduction or cancellation of a transfer of shares in the company, which had been made to and signed by him in December, 1842. The Lord Ordinary had conjoined the actions, which thereafter came to be treated as one. The facts of the case were these : —

In the year 1839 some persons formed themselves into a joint stock company, called the Forth Marine Insurance Company, for the purpose of carrying on the business of marine insurance. It was not incorporated, but was represented by a registered officer. By the contract under which the company was formed the capital stock was to be 100,000*l.*, divided into 4000 shares of 25*l.* each; and the shareholders became bound to contribute the amount of their respective shares as follows,—viz. ten per cent. on the amount, or 10,000*l.* in all, at the commencement of the business, and all the remaining 90,000*l.*, or 22*l.* 10*s.* of each share, were to be left in the hands of the shareholders themselves in the mean time, until the business of the company should require its capital to be paid up. They were to pay that sum at such periods, and by such instalments, as the directors for the time should appoint. The shareholders were to have the right to the profits, and be

¹ See *Bargate v. Shortridge*, 5 House of Lords Cases, 297; *New Brunswick Land &c. Company v. Conybeare*, 9 House of Lords Cases, 711; *Central Railway Company of Venezuela v. Kisch*, Law Rep. 2 H. L. 99, 110, 111; *Oakes v. Turquand*, Law Rep. 2 H. L. 325, 339.

liable for the losses, and in relief to each other in proportion to their respective shares, and no person was to hold more than 100 shares.

After the expiration of the first year, the shareholders were to be at liberty to transfer and dispose of their shares, if the purchasers or assignees should be approved * of by the direc- * 499 tors.¹ Every shareholder who disposed of his share of the company's stock, was to be entitled to relief from the others of the whole debts owing by the company, and all obligations granted for the same; and no person coming to the right of said shares formerly belonging to such shareholder so ceasing to have right, should have any claim against the others for relief from the debts

¹ By the fifteenth article of the company's settlement deed it was declared, that the partners shall not be at liberty to transfer and dispose of the whole or any number of the shares held by them until the expiry of twelve months from the said day of , being the period of the commencement of this contract of copartnery, but that immediately thereafter they shall be at liberty to do so, and that either gratuitously or for an onerous consideration *inter vivos* or *mortis causa*. But declaring always, that in the case of a sale or a conveyance *inter vivos*, whether for an onerous consideration or gratuitously, such sale or conveyance shall in no case be valid towards making the purchaser or assignee a partner of the company, unless he shall be approved of by the directors, and a minute to that effect entered in the sederunt-book. And declaring further, that the directors shall be entitled to consider the shares so attempted to be so sold or assigned, and the purchaser or assignee not approved of, as still belonging to the former proprietor thereof.

The sixteenth article gave the form of the transfer, by which the purchaser agreed to accept the stock, and to become a partner in the said company, and, as such, to fulfil, &c. the conditions contained in the company's deed of copartnery, and the by-laws made in virtue thereof.

The seventeenth article declared, that where the share or shares of any partner are regularly transferred or conveyed, in terms of the articles before written, or either of them, and that whether by the partner himself or by the directors of the company, the assignation or conveyance thereof, or other deed of transference whatsoever, or an extract from a proper record, shall be produced to the directors, and entered in a book to be kept for the purpose; and such purchaser, &c. shall become subject to, and be bound to observe, the whole articles and conditions of this contract, as well as all the regulations of the company, made or to be made in virtue of powers herein contained; and a minute to that effect shall be engrossed in the company's books, and regularly subscribed by such purchaser, assignees, heir, or executor foresaid, either personally under his own hand, or by an attorney duly authorised to act for him; and no purchaser, assignee, heir, or executor, shall be deemed or entitled to exercise any of the rights of a partner until every one of these requisites shall have been complied with.

and obligations contracted by the company, even although contracted previous to his becoming a shareholder, but he
* 500 should *take the precise place of his predecessor, and become subject to all the obligations incumbent on him.

There was to be an annual general meeting of the shareholders on the third Tuesday in June, when the annual election of ordinary and extraordinary directors was to take place, and an annual abstract or statement of the company's affairs was to be laid before the shareholders. Special general meetings were to be called at other times. The business of the company was to be carried on under the direction and superintendence of nine ordinary directors, who might be elected by the shareholders at their annual meetings, from among themselves; each director was required to possess at least twenty-five shares of the stock of the company. Twenty extraordinary directors were likewise to be annually elected at the general meeting of the company; and there was to be a body of trustees, of five in number, so long as the company should not be incorporated.

* 501 * The books were to be annually balanced on the 31st of May, and a balance-sheet made out, examined, docketed, and signed by a quorum of the directors and manager, and laid on the table at the annual meetings in June, for the inspection of the shareholders, and the substance thereof was then to be read or stated by the chairman. It was declared to be in the power of each meeting of the shareholders, if they should think fit, to appoint a private committee, consisting of three of their number, holding at least twenty-five shares each of the company's stock, for auditing and reporting upon such yearly states at a future general meeting, to be called for the purpose. That there should be no division of profits at the end of the first year; but that the clear interest and profits of every succeeding year, as these should appear at the time of each balance, after deducting fifty per cent. of the guarantie fund, should be divided rateably among the shareholders; and that in striking the amount of the clear interest and profits for division, the directors should take into their consideration the extent of risks then pending, and deduct from the said interests and profits such a proportion thereof as they should deem it prudent and requisite to set aside on account of the then pending risks.

The directors established agencies in Greenock, Glasgow, Dub-

lin, London, and Dundee ; and insurances to a very large amount were effected at their different places of business.

At the second annual general meeting, in June, 1841, it appeared that the total amount of premiums for the preceding year amounted to 198,036*l.* 8*s.* 9*d.*, and the amount of losses, averages, and other charges, to 111,962*l.* 12*s.* 7*d.*, leaving 86,073*l.*

16*s.* 2*d.* to cover * unsettled losses and pending risks. On * 502 the footing that this surplus was much more than sufficient to meet the probable future loss, the meeting, after setting aside 1500*l.* as a guarantie fund, in terms of the deed of settlement, agreed that 1500*l.* more, being fifteen per cent. on the 10,000*l.* of the stock which had been advanced, should be divided in name of profits. It was at the same meeting resolved, that the balance of the company's business, to be reported at the meeting in June, 1842, should be confined to the business transacted between 1st June and 31st December, 1841. The object of this was to leave a space of five months, to exhaust, in some measure, the outstanding risks, so that a more certain estimate might be formed of the profit and loss.

During the course of the next year, it appeared that, in consequence of the storms, of unprecedented frequency and violence, which occurred in 1841 and 1842, and the many frauds perpetrated, there would be a loss on the company's underwriting for the two first years. This was reported to the general meeting held in June, 1842. Out of the 6000*l.* which were estimated as the clear profits on the seven months' underwriting from 31st May to 31st December, 1841, the meeting resolved to divide 700*l.*, being seven per cent. on the 10,000*l.* of stock which had been advanced ; and a like sum of 700*l.* was set aside as a guarantie fund.

The directors, on 26th July, 1842, made a call for another instalment of ten per cent. on their subscribed capital, or of 2*l.* 10*s.* per share.

David M'Kenzie, who was a clerk of the appellant, Mr. Burnes, was a shareholder in the company, to the amount of fifty shares thereof. He failed to pay the call which was made on him for the second instalment, * excepting a small sum of 7*l.* * 503 1*s.* 8*d.*, and he asked for indulgence as to the rest. This was conceded ; but after some delay, the directors instructed the law agent of the company, Mr. John Gilmour, to prosecute him

for payment. Gilmour on the 5th November, 1842, wrote to M'Kenzie, who on the 8th of the same month, stated, that he had communicated the demand to the appellant, whose clerk he was, and who was to be in Edinburgh on the 13th or 14th of that month, and would call on Gilmour as to the arrangement of the matter.

The appellant alleged that he saw Gilmour, who was a shareholder in the company and likewise its law agent, in order to obtain from him information as to the state of the company's affairs; that Gilmour laid before him the balance-sheets and other documents, which professed to represent accurately the progress and success of the company, and stated to the appellant that the affairs of the company were flourishing, and that their stock was a valuable commodity; and that, mainly trusting to these representations, and relying upon the notorious fact, then pressed upon him, that large dividends had been made (but which he now averred to have been fraudulently made), the appellant was induced, in November, 1842, to take a transfer to M'Kenzie's stock. He was informed, however, that the directors would not sanction the transaction unless the defender paid up M'Kenzie's arrear out of the price. The transfer was executed on the 2d of December, but the defender had never signed the minute in the company's books, provided by article 17th. It appeared, however, that he had paid up the residue of the call for the second instalment, with interest thereon, and was enrolled as a shareholder in the books of the company.

*504 *The series of unusual storms and disasters at sea, already referred to, continued in the year 1842; and claims of very unexpected and unusual number and magnitude came suddenly upon the Forth Marine Insurance Company. The directors were not prepared with realized funds to meet all these claims; and, on the 19th December, 1842, they made a call on the shareholders for a payment of a third instalment of the shares in the company's stock. The sum so called for was twenty per cent., or 5*l.* per share, payable by two equal instalments, on the 1st of March and the 1st of May, 1843.

The accounts of disastrous losses, and consequent claims on the company, still continued to increase; and at the fourth annual general meeting of the shareholders, held on 20th June, 1843, they unanimously approved of the account and balance-sheet and reports

submitted to them ; and, in obedience to this resolution, the additional call was made, on 22d June, 1843, for the remaining 15*l*. per share of the capital stock of the company, which had still been left in their hands.

The appellant had not paid either of these calls, and a suit was instituted against him in the name of George Thomson, as the manager and representative of the company, on behalf of the company.

The appellant, in the action brought against him, pleaded that the forms required for constituting him a partner had never been completed ; that the sale and transfer were vitiated by fraudulent misrepresentation on the part of the directors of the company, their office-bearers, and law-agent. In the action brought by him against the company, he relied, on similar grounds, to have the sale and transfer reduced and * set aside ; to have it * 505 declared that he was not a shareholder ; and to have a return of the sums which he had paid.

The respondents put in, among others, pleas in law in the following terms.

1. On the 2d July, 1845, a fiat in bankruptcy was issued in England against the Forth Marine Insurance Company, upon which adjudication by the Court of Bankruptcy followed on the 5th of July ; and William Pennell was appointed official assignee, and the process was then continued in his name.

2. The allegations upon which Mr. Burnes's defences against the action for the payment of the calls are founded, besides being at variance with the truth, are not relevant in law to protect the defender from a demand by the company to pay up the proportion of the stock corresponding to the shares of the company held by him.

3. The allegations upon which Mr. Burnes's challenge of the transfer are founded, besides being incorrect in point of fact, are not relevant in law to support such a challenge.

4. The defender is barred from urging these defences and that challenge, in respect that by obtaining himself enrolled as a partner of the company, upon a transfer from M'Kenzie in his favour, and by continuing to hold that position, he has prevented the company from compelling M'Kenzie himself to pay up the proportions of the capital due upon the shares so transferred.

On 3d July, 1847, the Lord Ordinary pronounced the following interlocutor : Having heard parties procurators in the conjoined

actions, in which the assignees on the bankrupt estate of
 *506 the Forth Marine Insurance Company, the original defend-
 ers in the action of reduction and declarator, and the pur-
 suers of the action for payment, have been sisted as parties, finds
 that the statements made in the record by Adam Burnes are
 relevant to support the reductive conclusions thereof, and therefore
 repels the defences for the Forth Marine Insurance Company, and
 the third plea in law for the company, in so far as it is in said plea
 maintained that the allegations upon which the said Adam Burnes
 founds, in support of his challenge of the writ or writs called for
 to be set aside, even if true, are not relevant in law to support
 such challenge.

The respondents presented a reclaiming note to the Lords of the
 First Division of the Court of Session, "praying their Lordships
 to recall or alter the interlocutor submitted to review, and in the
 reduction and declarator, to sustain the defences for the Forth
 Marine Insurance Company, and the third plea in law annexed to
 the revised and amended condescendence for the company, and to
 assoilzie the said company from the conclusions of the said action of
 reduction and declarator; and, in the action at the said company's
 instance, to decern in terms of the conclusion of the libel, with
 expenses in both actions."

The Lords of the First Division unanimously pronounced judg-
 ment, "that, in the month of November, 1842, Adam Burnes,
 defender in the ordinary action, and pursuer in the reduction,
 became a partner in the Forth Marine Insurance Company to the
 extent of fifty shares of the capital stock thereof: find that there
 are no averments on record relevant to set aside the transaction by
 which the said Adam Burnes became a partner as aforesaid; or to
 liberate him from the obligations and liabilities thereby
 *507 undertaken by him to the extent of fifty shares as afore-
 said: therefore, in the reduction repel the reasons of re-
 duction, sustain the defences, and decern; and in the action at
 the instance of the Manager of the Forth Marine Insurance
 Company, now insisted in by the official and creditors' assignees of
 the bankrupt estate of the said company, repel the defences stated
 by the said Adam Burnes, and decern in terms of the libel."

The appeal was brought against this judgment of the Lords of
 the First Division.

The Attorney-General and *Mr. Anderson* for the appellant.

There has been a mistake committed here by the Lords of the First Division, and the case must be remitted. They have exceeded their jurisdiction. The appeal from the Lord Ordinary was made in respect of his decision in one of the two conjoined actions — that of the suit for reduction ; their decision is on both. He did not decide the action itself, but merely put the parties in a position to have the disputed facts ascertained by appeal to a jury — in the judgment on the appeal the actions themselves are decided. In this respect alone the judgment of the Court below is erroneous, and cannot be sustained.

But assuming that objection not to be fatal to the judgment, then it is submitted that the judgment itself is wrong in point of law. The appellant here was not a partner in this company. According to the 17th article of the partnership deed of 1839, he could not completely become so till he had performed certain acts, one of which is subscribing a minute in the company's * books, an act which it is not pretended he ever performed. * 508 This objection could not be taken by him in the action of reduction, for that action assumes an existing partnership ; but in the action brought against him by the officers of the company, he is entitled to take it. In that action he may lawfully say that he is not a partner according to the terms of the deed ; *Preston v. The Grand Collier Dock Company*,¹ where it was held that a transfer of shares, not made according to the specified form of conveyance, was void. Here the specified form had not been complied with, and the appellant was therefore free from all liability in respect of such transfer.

Then, as to the false representations which, he insists, relieve him from any liability on shares purchased by him, in consequence of such representations being made. These false representations were made by Mr. Gilmour, who was not only the agent of the company, but was, besides, a partner in it, and whose acts therefore affect the company in his double character of agent and co-partner. The principle applicable to contracts, made in consequence of such representations, seems to have been properly laid down in the judgment of Lord Fullerton, who said,² “ If any body of men, aware of the extent of their own liabilities, contrive by fraudulent misrepresentation or concealment of their true situ-

¹ 2 *Railway Cases*, 335.

² 20 *Scottish Jurist*, 241.

ation, to beguile another party into the association, to his loss and their gain, I see no reason why he should not be entitled to the ordinary legal remedies for obtaining the reduction of the * 509 transaction, at least as between him and the other * individual partners." This principle seems to have been forgotten in the decision of this case, but it is conclusive in favour of the appellant. It is a principle well warranted by the authorities, English as well as Scotch. In *Seddon v. Connell*¹ the point was incidentally decided, though the case itself was determined on the form of the proceeding there, which was held to be erroneous, the suit being brought against the public officer of the company, who was not the proper party to be made a defendant. But in *Stainbank v. Fernley*,² it was distinctly raised and decided. There the directors of a joint stock company, in order to sell their shares to advantage, represented in their reports, and by their agents, that the affairs of the company were in a very prosperous state, and declared large dividends, at a time when those affairs were greatly embarrassed.

[LORD CAMPBELL. — Such conduct on the part of directors of a company might subject them to criminal responsibility.]

A person who had been induced by these means to purchase shares of one of the directors was held entitled to maintain a bill against him for repayment of the purchase money. There, no doubt, the defendant was a party directly benefited by the misrepresentation. But it is not necessary that that circumstance should exist, in order to give the party injured his remedy by relief from the contract.

All the parties here are members of a partnership; and no members of a partnership can take advantage of fraudulent representations made by others of the same body. Interests * 510 obtained through the fraud of * another person cannot be maintained.³ The fraudulent representations need not be made to the party himself. If they are made to the public, and any one party is deceived by them, he will be relieved from his contract, on proof of the misrepresentation.

[LORD CAMPBELL. — But was Gilmour an agent of the company to make this representation?]

¹ 10 Simons, 58.

² 9 Simons, 556.

³ *Bridgman v. Green*, 2 Ves. Sen. 627; *Wilmot*, 58; adopted by Lord Eldon in *Huguenin v. Baseley*, 14 Ves. at p. 289.

He was so; he was at once the agent and the partner of the company, and the company is bound by his acts. In *Cornfoot v. Fouke*,¹ the principal would have been bound, but that there was no evidence to show that the agent knew the representation to be false. The case of *Fuller v. Wilson*² carries the rule further, and makes the principal liable for a misrepresentation made through an agent, though the agent did not at the time know it to be such. And though the judgment in that case was reversed, on error,³ the reversal proceeded on an entirely independent ground, namely, that of the declaration not being supported by the facts as found in the special verdict. And in *Evans v. Collins*,⁴ given as a note to that case, it was held, that where a false representation was made by one party, who might have known, but did not know, the truth, and another party, who could not know it but trusted the representation, suffered from it, the former must "abide the consequences of his misconduct." To the same effect is *Taylor v. Ashton*,⁵ where it was held not to be necessary to * show that the defendant knew the representation to be *511 untrue. And in *Langridge v. Levy*,⁶ the principle which is to be deduced from these various cases had been previously laid down, though it was there applied to a different state of facts.

Mr. Rolt and *Mr. Inglis* for the respondents: —

The objection to the jurisdiction of the Lords of the First Division, on the ground that they decided on both suits — whereas the appeal to them was only on a decision of the Lord Ordinary, affecting one of them — was not taken in the Court below, and cannot therefore be entertained here. But assuming it to be entertained, then the answer is, that it is not founded in fact; for the Lord Ordinary's decision was, in form as well as substance, given in the conjoined actions; and his declaration that the statements made on the record by Burnes were relevant to "support the reductive conclusions" in his suit, was in effect a decision that he was not liable to the Company for the calls attempted to be enforced in the other suit.

¹ 6 Meeson & Welsby, 358.

² 3 Q. B. 68.

³ 3 Q. B. 58.

⁴ 3 Q. B. 78 note, and 5 Q. B. 804.

⁵ 11 Meeson & Welsby, 401; but see *Moens v. Heyworth*, 10 Meeson & Welsby, 147.

⁶ 2 Meeson & Welsby, 519; affirmed 4 Meeson & Welsby, 337.

In truth, the Lord Ordinary decided both the suits in the one interlocutor, and the Lords of the Inner House simply reversed his decision, but specified the points of application of their judgment. They thought that fraud disposed of the action for calls as well as the action for reduction, and they framed their judgment accordingly. The first objection to the judgment of the Court below cannot therefore be supported.

Then as to the case itself. The principle applicable to cases where fraud is set up is the same in Equity as at Law.

* 512 That principle was well laid down in *Evans* * v. *Bicknell*,¹ where it was held that to vitiate a contract on the ground of the statement of a misrepresentation, that statement must have been made with a view of deceiving some one in the particular way in which the person complaining of the statement says that he was deceived by it. That decision was followed soon after by the case of *Pasley v. Freeman*,² where the principle laid down was that the false representation must be made with the intent to defraud. Here there was no pretence for saying that such was the case. In *Langridge v. Levy*,³ the representation was false; it was so within the knowledge of the person who made it; it related to a simple fact, and not to a contingent calculation; it was made with a view to deceive, and it did deceive the party to whom it was addressed. That case, therefore, in no respect resembles the present. Nor is *Stainbank v. Fernley*⁴ in point, for there the suit was against the individual director, who had made and benefited by the misrepresentation, and not against the company. Besides which, there is this distinction running between the present case and all the cases that have been cited, that in no one of them is the question raised between a partnership and one of the partners, but it is always between party and party, the two persons having no partnership connection with each other. The case of *Winterbottom v. Wright*⁵ shows that where the parties have, as they have here, distinct interests, the act of one will not make the other liable to damages.

* 513 [LORD CAMPBELL. — But was not Gilmour here a * partner of the company, and, as such, capable of affecting the other partners by his acts?]

¹ 6 Ves. 173.

⁴ 9 Simons, 556.

² 3 Term Rep. 51.

⁵ 10 Meeson & Welsby, 109.

³ 2 Meeson & Welsby, 519, affirmed 4 Meeson & Welsby, 337.

He was not; for the members of this body formed a joint stock company, which is not like an ordinary partnership, because all the world knows that its affairs are managed in a particular way, and that no act of any individual partner will bind the rest.

As to another part of the case, it is contended on the other side that no partnership has been created here between the appellant and the company, so as to bind the appellant, and the fact that he did not sign the minute in the books of the company is relied on for the purpose of that argument. The answer is, that the stipulation that he should do so was only made for the protection of the company, and might be waived by the company without its rights being affected. *East Lothian Bank v. Turnbull*.¹ In the case of *Mangles v. The Grand Collier Dock Company*,² which followed and explained that of *Preston v. The same Company*,³ no note of the transfer was executed, yet the party was held liable; but here the note of the transfer has been executed, and the appellant's name has been enrolled in the books of the company. And even had that not been so in this country, the right of this appellant must have been decided by the law of Scotland, which has been declared in this House in the case of *Allan v. Turnbull*,⁴ where it was held that on shares assigned to bankers, the assignment being duly intimated to the company, the bankers became liable as partners, although the assignment was made in order to secure payment of a debt, and though certain * forms, prescribed by * 514 the contract of partnership as to transferring shares, had not been observed. This last-named case expressly recognised and adopted the decision in the *East Lothian Bank v. Turnbull*. On that point, therefore, it is clear that there must be judgment for the respondents.

There is no averment in the summons here, of fraud committed by the directors, in declaring the dividends; but the appellant insists, that as these dividends turned out afterwards to have been unwisely made, they must be treated, so far as he is concerned, as if they were fraudulently made, for that he was deceived, by such dividends being declared, into the belief that the company was in a prosperous condition. Such a mode of dealing with past events is an absurdity, and can form no ground for relieving the appellant from his liability.

¹ 3 Shaw & Dunlop, 95.

² 2 Railway Cases, 359.

³ 2 Railway Cases, 335.

⁴ 7 Wilson & Shaw, 281.

The Attorney-General in reply. — It is nothing to say here that this was a joint stock company ; it was strictly a mercantile partnership, formed with a larger number of members than other partnerships, but with the absolute control in the members at large, for they might have special meetings at any time to regulate their affairs. Each partner was therefore liable, as in any partnership with the ordinary number of members. Gilmour got a benefit by these representations, which induced a solvent and a rich man, instead of a poor one, to become a member of the concern. So that, if that was necessary, the proof exists here of a benefit being the result of the misrepresentation. But no such proof is necessary. *Pasley v. Freeman*.¹ Here a member

*515 of a firm made false *representations. If he was an agent of the company, and if it was within his authority to make them, the firm cannot benefit by them because they are false. If he was not the company's agent, then the company cannot found any rights on acts which he had no authority to perform, especially as the appellant has not executed those instruments which, by the very constitution of the company, are conditions precedent to his becoming possessed of the rights of a member.

July 16.

LORD CAMPBELL. — My Lords, on the 28th of July, 1843, the Forth Marine Insurance Company, established in the year 1839 as a joint stock company, with transferable shares, commenced an action against the appellant for calls, alleging that he had become a member of the company by purchasing and accepting the transfer of fifty shares, on the second day of December, 1842. The calls sued for were, one ordered on the 19th of December, 1842, of 20*l.* per cent., and another ordered on the 21st of June, 1843, of 15*l.* per cent.

The appellant denied his liability as a shareholder ; and on the 28th of May, 1844, commenced an action of reduction against the company, and also against David M'Kenzie, for whom he had purchased the fifty shares, praying by his summons that the transfer of the shares to him might be set aside ; that it should be declared that he never was a partner in the company, or liable as such ; that he should be reponed and restored *in integrum* ; that it should be declared that the said David M'Kenzie remained liable

¹ 3 Term Rep. 51.

in respect of the fifty shares, and that the sum of 200*l.*, paid by him for the shares, should be repaid to him, with interest.

* No fraud was alleged against David M'Kenzie, but he * 516 made no defence, and there was a decree against him in absence.

The company making defences to the action of reduction, the Lord Ordinary very properly conjoined this action with the action at the suit of the company, for calls. In the conjoined actions there was one record, which set forth the condescendence of the company, with the answers of Mr. Burnes, and Mr. Burnes's statement of facts, with the answers of the company, and the pleas in law on both sides. The second and third pleas in law on behalf of the company, on which the case depends, were that Mr. Burnes's allegations are not relevant in law to protect him from the payment of the calls, or to support his action of reduction.

The case came on to be argued before Lord Wood, as Lord Ordinary ; and he pronounced a decision which was made the subject of a reclaiming note to the Lords of the First Division of the Inner House. [His Lordship read the Lord Ordinary's interlocutor, the reclaiming note, and the interlocutor of the Lords of the First Division.]

From this interlocutor Mr. Burnes has appealed to your Lordships' House, and the first objection taken to it by his learned counsel is, that it finally disposes of both actions ; whereas the Lord Ordinary had only decided a single point in the action of reduction, and had given no opinion respecting the action for calls, it being contended that the Inner House had exceeded its jurisdiction, which was confined to a review of the decision of the Lord Ordinary on the point which he had disposed of. This objection was not made in the Court below, where all the questions arising on both actions * were very copiously discussed, * 517 without any doubt as to jurisdiction, and it is not even hinted at in the cases laid on your Lordships' table. I am of opinion that it is wholly untenable. The reclaiming note professed, and did bring, both actions before the Inner House, and the Inner House, as the Court of Appeal, was empowered, and was bound to pronounce the judgment which ought to have been pronounced by the Court of first instance. The Lord Ordinary, if he had thought fit, might have referred both actions at once to the Inner House, without deciding any thing, and when the case came

before the Inner House, upon the reclaiming note, an equally extensive jurisdiction was conferred upon the Judges there.

Another objection made by the appellant, of a formal nature, is that he had not subscribed an entry in the company's books, according to the seventeenth article of the deed of copartnery, which, upon a transfer of shares, requires such a subscription, and declares, "that no purchaser shall be deemed or entitled to exercise any of the rights of a partner, until this requisite be complied with." Although this objection was, after long argument, abandoned by the appellant's counsel in the Court below, they are not precluded from taking it here, as it is raised by the record, but I am of opinion that it was properly abandoned below, because it is untenable. Looking at the seventeenth and the preceding article, it is quite clear that the subscription in question is a duty cast upon the purchaser for the benefit of the company, and that he cannot resile from the contract because he has not performed it. If the deed of transfer stands, and Mr. Burnes had become a partner, there can be no defence to the action for calls. Every

* 518 thing depends therefore on "whether the statements * made by him in the action of reduction are relevant to support the reductive conclusion thereof." As to that, facts must be averred with reasonable precision, facts which, if proved, would be sufficient to support the reductive conclusions of the summons. It is not enough to set forth general allegations of fraud, for by such allegations a party cannot take advantage of his own default. On the 2d of December, 1842, there was a regular deed executed, to which Mr. Burnes was a party, and by which, with his consent, and with the privity and sanction of the company, the fifty shares were regularly transferred to him. Therefore it became his duty to see that the form specified in the 17th article was complied with. From his default the company might have said that he was "not to be deemed or entitled to exercise any of the rights of a partner," but he is forbidden to avail himself of any such plea.

We come, therefore, to the question which the Lord Ordinary decided, apparently on the ground of the fraud charged against the defenders. Facts must be alleged which show that such a fraud has been practised by them upon him as will entitle him to the judgment which he prays.

I am first struck by a circumstance, which I do not find noticed in the Court below, that although it is sought to set aside the trans-

fer as against M'Kenzie, it is likewise sought to fix upon him a continuing liability as a partner, and to have a decree pronounced by which, having sold his shares for 200*l.*, of which sum only a small portion came into his pocket, he would have to pay at least 1000*l.* in respect of subsequent calls. As far as he is concerned, there really is no allegation of fraud to impeach the transaction, either in the summons *or condescendence. If the di- * 519 rectors are liable to all the charges brought against them, he was sinned against, as one of the innocent and betrayed shareholders. But if the directors cannot avail themselves of any defect in the case, so far as he is concerned, after the decree against him in absence, let us see what facts are alleged in respect of which the reduction is to be supported against the company.

It must be borne in mind, that the transfer now sought to be set aside, was executed on the 2d of December, 1842, and that Mr. Burnes tells you that, till the preceding month of November, he knew nothing about the affairs of this company (being probably ignorant of its existence), and that he then became acquainted with it from the circumstances of David M'Kenzie, his clerk, being a shareholder, and unable to pay a call. Montrose is his usual place of residence, but he then happened to be in Edinburgh, and certain communications were made to him by Mr. Gilmour, who was the law agent to the company, and had been employed by the company in that capacity to sue M'Kenzie for the arrears.

Under these circumstances, the question arises whether the company is bound by the communications which Mr. Gilmour then made to Mr. Burnes respecting its commercial affairs and commercial prosperity; for if the company is not so bound, we need not consider the weight and effect of the representations then made. I am of opinion that in making these representations, he was not acting within the scope of his authority from the directors. He was employed by them only as a lawyer, to demand and sue for a debt due from a shareholder; and he had no authority to make any disclosure respecting the concerns or the condition

* of the company to a stranger who contemplated the pur- * 520 chase of shares in the company.

It was hardly contended at the bar that the directors are bound by what Mr. Gilmour said or did on that occasion, merely because he was the law agent of the company; but it has been most strenuously urged that the directors are bound by all that he said

and did, on the ground that he was himself a shareholder in the company. We are told that a joint stock company (at least if not incorporated, and only empowered by a public Act of Parliament as this is, to sue and be sued by its officers) is in the same situation as any mercantile partnership consisting of two or three individuals carrying on business jointly under an ordinary deed of partnership or by a parol agreement among themselves of which the world is ignorant, in which case what is said or done by any one partner respecting the partnership business affects all the partners, although in violation of their agreement *inter se*. But why is this so? Because, carrying on business jointly under a common form, they hold out to the world that each of them has authority to manage the partnership concerns. Therefore all are bound by what each does in conducting the partnership business. All the members of the firm are liable to the *bond fide* holder of a bill of exchange, drawn, accepted, or indorsed by any one of them. But supposing that A. B. and C. entering into partnership, it is expressly stipulated that A. shall not draw, accept, or indorse bills in the partnership firm, and this stipulation is known to X., he would have no remedy against B. and C. on a bill of exchange which he induced A. to draw, accept, or indorse. Therefore on

the principle which regulates the liability of common parties, a distinction must be made between * a member of a common mercantile partnership and a shareholder in a joint stock company. No one will contend that a joint stock company would be liable on a bill of exchange, drawn, accepted, or indorsed by any one shareholder. Why? Because it is known that the power of carrying on the business of the company, and of drawing, accepting, and indorsing bills of exchange, is vested exclusively in the directors. This shows that, although a joint stock company is a partnership, it is a partnership of a different description, and attended with different incidents and liabilities, from a partnership constituted between a few individuals who carry on business jointly, with equal powers and without transferable shares. All who have dealings with a joint stock company know that the authority to manage the business is conferred upon the directors, and that a shareholder, as such, has no power to contract for the company. For this purpose, it is wholly immaterial whether the company is incorporated or unincorporated. Here it is not alleged that Mr. Burnes knew that Mr. Gilmour was

a shareholder, or that in respect of his being supposed to be a shareholder, he gave any faith to his representations. Mr. Burnes knew, or might have known, that there were nine directors appointed to manage the business of the company. He knew that Mr. Gilmour was not one of them, and he dealt with Mr. Gilmour merely as the law agent, employed to recover the arrears due from M'Kenzie. The doctrine contended for by the appellant would lead to the conclusion that a joint stock company is liable on any contract entered into by any shareholder within the scope of the business for carrying on which the company is established ; and that any contract, regularly entered into with the *direct- * 522
tors, may be vitiated by any thing said or done by any shareholder, without the authority or privity of the directors. Considering the important transactions now carried on through the medium of joint stock companies, the doctrine is very alarming ; but it rests on no principle, and no authority has been cited to support it. The case relied upon of *Stainbank v. Fernley*,¹ I entirely approve of. But that was a bill filed by the purchaser of shares in a joint stock company against the vendor, who was alleged personally to have deceived the plaintiff by a false statement of material facts ; and then, without affecting the interests of the company, the plaintiff sought repayment of the purchase money with interest, on retransferring the shares to the defendant. The Vice-Chancellor of England therefore rightly held that the plaintiff stated a case entitling him to relief.

We now come then to the allegations respecting the acts of the directors themselves ; and if the plaintiff has been deceived and defrauded by them, and induced by them to purchase the shares by their false representations, the interlocutor must be reversed. I do not think it necessary even that the representations should have been made personally to him. If the directors have made false representations for the purpose of fictitiously enhancing the price of shares for their own benefit, and the appellant has thereby been deceived, and induced to purchase shares greatly beyond their value, the transfer of the shares, although executed, ought to be set aside.² But the transfer having been executed, a clear and strong case of fraud ought to be established, and it must

¹ 9 Simons, 566.

² See *New Brunswick &c. Company v. Conybeare*, 9 House of Lords Cases, at p. 722 ; *Central Railway Company of Venezuela v. Kisch*, Law Rep. 2 H. L. at p. 110.

* 523 be shown that the purchaser * of these shares was induced to purchase them by the deceit of the director.

You will observe that the misconduct imputed to these directors resolves itself into misconduct as between them and the shareholders. The directors are not charged with any design to raise the value of the shares in the market fictitiously, for the purpose of obtaining a high price for shares to be sold on behalf of the company, or which they themselves held individually. Nor is any connection alleged between the supposed misconduct of the directors, and the purchase of the shares by the appellant. Their acts of imputed misconduct begin years before he had purchased or entertained any intention of purchasing shares, and surely it cannot be contended that the purchaser of shares in a joint stock company, when sued for calls, may get rid of his liability by showing that at some past period the directors have misconducted themselves. Assuming that the accounts rendered by these directors to the shareholders were erroneous or false, there is no allegation that they were ever brought to the notice of the appellant, except by Mr. Gilmour, or that he knew any thing of their contents before November, 1842, or that they were ever made public, or exhibited, except at a meeting of the shareholders. Suppose that an action should be brought by Mr. Burnes against the directors for a deceitful representation, whereby he was induced to purchase the shares at a fictitious value, what facts are alleged upon this record which could be used to support such an action? There are no allegations of that kind. Mr. Burnes himself attributes his unlucky purchase entirely to what passed between him and Mr. Gilmour, for which the directors are not answerable.

* 524 But looking to the accounts, they really cannot be * said to be false or fraudulent. It is not enough to bestow such epithets upon them, if, upon examination, they cannot be charged with falsehood. But the accounts rendered in June, 1841, and June, 1842, do not state what is false. There is in them no falsification of figures. They gave a true statement of the premiums received, and the adjusted losses. In a balance sheet, liquidated items can alone appear, either on the debtor or creditor side. The complaint that the balance sheet contained no statement, and made no estimate of pending risks, is absurd. Such a statement could not be introduced into a balance sheet; and if the business

was prudently conducted, the greater the amount of pending risks, the more prosperous was the condition of the company. No estimate could be made of losses thereafter to occur, unless the directors had been endowed with the faculty of second sight, and could have discovered the shadows of coming shipwrecks and captures.

The grave part of the charge against the directors really resolves itself into the supposed fictitious dividends of 15*l.* per cent., ordered in June, 1841, and of 7*l.* per cent., ordered in June, 1842. I repeat what I threw out during the argument (and for which I had the high sanction of my noble and learned friend), that it is most nefarious conduct for the directors of a joint stock company, in order to raise the price of shares which they are to dispose of, to order a fictitious dividend to be paid out of the capital of the concern. Dividends are supposed to be paid out of profits only, and when directors order a dividend, to any given amount, without expressly saying so, they impliedly declare to the world that the company has made profits, which justify such a dividend. If no such profits have * been made, and the divi- *525 dend is to be paid out of the capital of the concern, a gross fraud has been practised, and the directors are not only civilly liable to those whom they have deceived and injured, but, in my opinion, they are guilty of a conspiracy, for which they are liable to be prosecuted and punished. I am one of those who think Lord Cochrane was unjustly convicted of a conspiracy to raise, by false rumours, the price of the public securities for his own advantage, and to the injury of the King's subjects, who were deceived ; but no one has gravely doubted that the imputed offence was one of a kind which amounted in point of law to a misdemeanor. There can be no doubt therefore that a conspiracy by falsehood (as by a fictitious dividend) to raise fictitiously the market value of shares of a railway company, or any other joint stock company, that the Queen's subjects may be deceived and injured, and that at their expense a profit may be made by the conspirators, would be an indictable offence.

But setting aside the objection that here there is no sufficient allegation to connect the supposed fraud with the act of the appellant, in purchasing the shares, how can it be said that the dividend was paid out of capital. . The capital of the company consisted of the 10,000*l.*, paid up out of the 100,000*l.* of the capital subscribed.

The 1500*l.* set aside for payment of the 15*l.* per cent. in June, 1841, and the 700*l.* for payment of 7*l.* per cent. in June, 1842, were taken from premiums which had been received to a vastly greater amount. It might be imprudent to order these dividends, but it does not follow that they were ordered fraudulently, and there is no allegation that they were ordered in contemplation of

the sale of any shares, either for the benefit of the company,
 * 526 or for the benefit of any of the directors. * There is no surmise even that the dividends were connected with any traffic in the shares of the company. I may observe that in such a concern as this, there must be infinite difficulty in fixing a fair dividend. In railroad companies, it must be comparatively easy, for there is no risk to calculate there, except (for which there ought to be a handsome reserve) that of killing a certain number of her Majesty's subjects. The directors have only to take an account of receipts and outgoings, and, striking a balance according to the ordinary rules of arithmetic, to say how much is to be ascribed to each share. But the directors of a marine insurance company must look to the probabilities of war and peace, and take into consideration accounts of distant tempests, to which ships insured by them may have been exposed. If lives are insured, they must attend to the approach of the cholera, and the sanitary precautions adopted to meet it. This month there may be grounds for a good dividend, and the next month a call may be indispensable.

The fact is alleged, and not denied, that there having been a dividend ordered of 7*l.* per cent. in June, 1842, in the month of July following, a call was ordered of 10*l.* per cent. The conduct of the directors in ordering a call so soon after a dividend, has been severely animadverted upon ; but it might be perfectly justifiable, from the varying circumstances of the company, and at any rate Mr. Burnes has no right to complain of it, as a ground for the reduction of the transfer, for he himself admits that he was fully aware of it in November, 1842, before he had purchased the shares, and before the transfer was executed. If such a coincidence of dividend and call be conclusive proof of insolvency,
 * 527 then he wittingly became a member of an * insolvent company, and there is no pretence for saying that he was deceived. But, in truth, he was perfectly satisfied with the bargain, till the subsequent calls were made, for which the original

action was brought. I believe that his bargain was a very bad one, but he had only to blame his own want of caution in entering into it. If he had made inquiries of the directors, or the actuary, their authorised agent, to give information, he would probably have found that heavy losses had lately arisen, which could not have been properly introduced as items in any preceding balance sheet; but he was probably pleased with the amount of premiums, and calculated that these would all turn out to be pure profit.

However this may be, I concur in the unanimous opinion of the Judges of the First Division of the Court of Session, that he has not averred any facts which entitle him to be released from the engagement into which he deliberately entered as a shareholder of this company.

Looking to the facts which the appellant avers, and taking those facts to be true, I am of opinion they do not make out any case of fraud practised upon him, and that he must be left to suffer from the effects of his own imprudence. For these reasons I move that the interlocutor appealed from be affirmed, with costs.

LORD BROUGHAM. — I entirely agree with my noble and learned friend in the conclusions at which he has arrived; and after the very able and elaborate manner in which he has gone into all the points of the case, both into the less important technical matter with which he prefaced his * argument, and into the * 528 merits of the case itself as to the allegations, and as to the facts proved, I so entirely go along with him in his view (with one exception indeed, with which I am about to qualify my assent), that it is unnecessary for me long to detain your Lordships.

In the first place, with respect to the preliminary objection which was taken at the Bar, which appears to me to have no force, I wish to state that I am not for reversing this decree, in respect of that preliminary objection. I mean the objection that both actions were not competently before the Lords of the First Division, when they gave their judgment; for I think that they were fully before the Judges of that Court.

I do not think it is necessary in support of the judgment below, or in support of our affirmance of that judgment, to say that the effect of a reclaiming petition was to bring both actions before the Inner House, as if they had been conjoined. Conjoining two actions is *pars judicis*, as is often said in the Scotch law and practice,

and therefore I am unwilling to say what the effect of a reclaiming note is, and whether that might be supposed to supply the defect of an interlocutor conjoining the two. It is quite unnecessary to state that, because I think this is fatal to it, — which my noble and learned friend has already remarked, and upon which I rest my opinion as being a sufficient ground in itself, — that this was not objected to at the proper time and place. This objection ought, past all doubt, to have been taken in the Court below, where it was not taken ; and whether the reclaiming note had so large an effect or not, at all events that note brought both interlocutors (as I understand) before the Inner House, and with the reclaiming * 529 note the Court had to deal. The reclaiming * note was the ground upon which the Court was called upon to decide, and it was upon the reclaiming note that the judgment proceeded. Then I say that it is quite enough for me, in order to enable me to dispose of this merely technical objection, to say that it was not taken at the proper time and place.

As to the third technical point also, I entirely concur with my noble and learned friend.

Now we come to the argument upon the merits. There is a very great difference between a matter executory and a matter executed. Thus, for instance, if you have a bill for a specific performance, much less misrepresentation and fraud may be necessary to answer that bill and to call upon the Court to refuse to decree specific performance than would be required, after the execution of the contract, to set it aside. After the contract is executed, it would require a great deal more stringent proof of fraud, *dolus dans locum contractui*, to set the contract itself aside, than would be required to prevent its specific performance if the matter had rested *in fieri*, and had been executory merely. That was very distinctly stated in a celebrated case in this House, — celebrated on account of the length of the litigation and its importance, and also on account of the position of the parties, — namely *Harris v. Kemble*,¹ which was heard by Lord Plunket, Lord Eldon, and myself. In that case, that principle was very fully illustrated. But it is a matter past all doubt, and requiring no further argument or consideration.

But here was a contract executed. Mr. Burnes had purchased the shares, and he resists the calls made upon him by force of that

¹ 2 Dow & Clark, 463.

contract. Under these circumstances, it would require a very strong case of *fraud ; it would require not merely a * 530 general averment that there had been irregular conduct on the part of the directors, not only a general averment that they had behaved trickily (if I may so speak), but that there must be legal fraud, it must be *dolus dans locum contractui*. It is not enough for a man to say, If you had not given such an appearance of the flourishing state of affairs,—if you had not, by paying dividends out of capital (making the public believe that you were paying them out of profits), given this flourishing appearance to the concern by your own acts and deeds, I should never have bought my shares. That, I say, is not enough. You must show that there has been some specific fraudulent conduct on the part of those directors,—some grossly fraudulent conduct which gave rise to the particular contract in question. It is not a general averment of *dolus* ; it must be *dolus dans locum contractui*. That is the language of the Civil Law, which all nations have followed, and the general principles of which, in all matters of personal contract, constitute the law of all Europe at this moment. Now here there is no averment of any such fraud as that ; and, as my noble and learned friend has well pointed out, if there had been such an averment, there is a failure of proof. Because, take the instance of the 1500*l.*, which was first paid, and of the 700*l.* afterwards, both those dividends were paid out of premiums. It will not do to say,—If you had set down the premiums on the one side, and the actual and pending losses on the other, the gains and the losses would have so counterbalanced each other, that, striking a balance between the two at that particular moment when those two dividends were declared, they could not have been paid out of the premiums. That is not enough ; that is not sufficiently fraudulent conduct, * happening as it did before the con- * 531 tract, and not connected in any way with the contract, to vitiate the proceedings to which the party may be said to have been so induced.

To illustrate the proposition that it is not every false representation by acts and deeds, whether by the conduct of an owner of property, or by the conduct of a body, such as a railway company represented by the directors, that would vitiate any contract that may be made, because those false representations by the proprietor or by the company may be said to have supplied a motive for the

party contracting with them ; to illustrate that proposition I will put a case. But, first of all, let me say that I beg to be understood as going with those who view with the greatest severity the conduct of railway directors in declaring dividends which can only be paid out of capital, because I consider that that is, of itself, a most vicious and fraudulent course of conduct. It is telling the world that their profits are large, when it may be that their profits are *nil*, or that their losses are large, with no profits. It is a false and fraudulent representation by act and deed, much to be reprobated ; and I go the full length of what my noble and learned friend has laid down, that it would be a just ground, if a course of conduct of this sort were pursued, coupled with such circumstances as clearly to show a fraudulent intent, for proceedings of a graver nature against these parties. I go along with him, too, in the illustration which he made use of, namely, that there was a clear ground in law for indicting Lord Dundonald (then Lord Cochrane) and his relative Mr. Butt and others for a conspiracy, but that the verdict was wrong, because I think the verdict was not borne out by the evidence. I mean, so far as Lord *532 Cochrane was concerned. Mr. Johnson *fled, and there is no doubt that he was guilty ; but Lord Cochrane and Mr. Butt, in my opinion, were not guilty, and they were erroneously convicted. I was counsel in the cause, and therefore I may be said to have viewed it with prejudice at the time ; but I have since fully considered it, and I was one who gave the advice to his late Majesty to restore Lord Cochrane to his rank, as having been erroneously convicted. I never should have given that advice to my Sovereign, notwithstanding the illustrious services of that noble Lord, if I had not believed that he had been wrongly convicted. But that there was in law a conspiracy, for which a judgment of an infamous nature might pass upon the parties who were guilty in point of fact, I have no doubt, any more than has my noble and learned friend.

But, my Lords, I was just going to illustrate the point by this case. Suppose that a landlord, in order to make it appear that his tenants are very flourishing, and that his estate is very valuable, remits privately rent to his tenant ; suppose he enables that tenant to live very comfortably, and even luxuriously in a comfortable farm-house ; and supposing all the while that this is owing to his remitting the rent, and perhaps even out of his capital doing

something more for the tenant ; and suppose that in consequence Lord A. or Sir John B.'s tenants are supposed to be very flourishing, and his estates to be very valuable ; and suppose the consequence of that is, that after they have got this name in the world for five or six years, a man comes forward and bids for the estate, or a tenant comes forward to bid for and take the farm : it would be a very strong case to say that this little manœuvre of the landlord to make things appear comfortable and better than they really were, would be such a fraud as * would entitle * 533 the tenant who had taken the farm, when he was called on to pay his rent, to say, " Oh, it was all owing to my seeing my predecessor in such comfortable circumstances that I was induced to become your tenant ; therefore I will not answer your call " (the rent being in the nature of the call here). " I will not answer your call for my instalment, my next half-year's rent ; it is a fraud you have committed, and therefore though I have executed the contract, you have yourself to blame." No such answer to a demand for rent could be allowed. But I do not know, if there were a bill for a specific performance of an agreement to take a lease, which had not actually been taken by the tenant, how far that would be an answer to that bill ; but I am confident that no Court of Equity would, under those circumstances, set aside a contract or a lease which had been executed.

Upon the remaining parts of this case, my noble and learned friend having so elaborately argued them, I do not think it necessary to dwell. I agree entirely in the conclusions at which he has arrived ; and I am of opinion, first, that there is no such fraud relevantly alleged as would be a sufficient answer to the action ; and, secondly, that there is total absence of proof of such fraud as would entitle this party to have this contract set aside. I therefore entirely agree and support the motion of my noble and learned friend.

Interlocutor affirmed, with costs.

*534 *IN COMMITTEE FOR PRIVILEGES.

1845. June 9, 17; July 4, 10. 1846. March 2, 16; May 8; July 30. 1847. June 22; July 5. 1848. May 16; June 28; August 11.

The Earldom of CRAWFORD and Barony of LINDSAY.

Dignities, Creation of. Course of Descent. New Patent. Evidence. Competency of Witness.

In a claim to an ancient Scotch Dignity, if no patent or other instrument of Creation can be produced, it may be presumed that the Dignity was created by patent or charter, limiting it in the manner in which it has been actually enjoyed: And if that enjoyment be shown to have been confined to heirs male, in exclusion of nearer heirs female, the Dignity must be held to be a male Honour, always descendible to the heirs male of the body of the first grantee.

Ancient documents of a public character, brought from the proper repository, are, in the absence of patents or Parliamentary records, admissible as evidence of the creation and existence of Peerages: And semble, that, by the law of Scotland, contemporaneous history is admissible for the same purpose.

An ancient patent without the seal, but with the attestation thereof duly verified, is admissible evidence.

An ancient Scotch Dignity might, before the Union, be conveyed by the possessor, together with the territory thereto annexed, to another branch of the family, or even to a stranger, with the King's authority; or it might be resigned to the King, to be re-granted by a new patent, with different destinations and with its old precedencey.¹

A witness brought to prove a copy of an old document should be able to read and understand the original when he compared the copy with it.

THE petition of James Earl of Balcarras, presented to the Queen in 1843, claiming the above ancient Scotch Dignities;² and also the petition of Robert Lindsay Crawford, Esquire, presented to her Majesty in 1845, claiming the same and other Dignities,³ were by her Majesty referred to the House of Lords, *535 *and by the House to the Committee for Privileges, to inquire and report thereon.

The Committee sat, for the first time, the 9th of June, 1845,⁴

¹ See The Earldom of Perth, post, pp. 865, 885, 904 note.

² See 75 Lords' Journals, 327.

³ See 77 Lords' Journals, 109.

⁴ The Standing Order, No. 128 (now No. 86), requiring a claimant to a Peerage, within six weeks from the presenting of his petition to the House, to lay on the table his printed case, pedigree, and proofs, was dispensed with, on the

when Mr. (afterwards Sir Fitz Roy) Kelly, Mr. Wortley, Mr. John Riddell (of the Scotch bar), and Sir John Bayley appeared as counsel for the Earl of Balcarras. No counsel appeared for R. Lindsay Crawford, nor did he present a printed case to the House.

The Lord Advocate for Scotland, and the English Solicitor-General attended on behalf of the Crown.

Mr. Kelly stated the claim of the Earl of Balcarras. His statement, abridged and corrected by the evidence, was, that Sir David Lindsay, Baron of Crawford and Glenesk, — and supposed to be son-in-law of Robert II., King of Scotland, — was, on the 21st of April, 1398, created Earl of Crawford. No original patent, charter, or other written constitution of the Earldom is extant; certainly none has been found, after the most diligent search. There are, however, numerous public instruments, — besides contemporaneous history, which is admissible evidence¹ in cases of ancient Scotch Peerages, — showing that Sir David Lindsay was, at the *period above mentioned, created Earl of *536 Crawford, and there is unquestionable evidence of the descent of the Dignity, for many generations, to the heirs male of his body, passing over the heirs female on several occasions. The rules of law, therefore, which have been recognised and acted upon by this House, in a great number of Peerage cases, are applicable to this, namely, that where no patent or other instrument of creation is found, it will be presumed that a patent was granted transmitting the Dignity in the line in which it has been actually enjoyed,² and that when, as in this case, the enjoyment hitherto has been confined to heirs male, in exclusion frequently of nearer heirs female, the Dignity must be exclusively descendible to the heirs male of the body of the first grantee.³ Accordingly

claimant's petition, stating, that by reason of the length of time through which his pedigree had to be traced, and the multiplicity of proofs and authorities on which it depended, his counsel had not been able, with all his diligence, sooner to complete the preparation of his case. (77 Lords' Journals, 62.)

¹ Stair's Inst. b. iv. tit. xlii. § 16; Ersk. Inst. b. iv. tit. ii. § 7. See also The Polwarth Case in 1835.

² The Sutherland Peerage Case, Lords' Journals for 1766 – 1771.

³ The Earldom of Cassilis and Barony of Kennedy, Lords' Journals for 1762; Barony of Borthwick, Ibid.; Barony of Spynie, Lords' Journals for 1785; and Barony and Dukedom of Roxburghe, Lords' Journals for 1812. This rule of

it will be shown that the title and dignity of Earl of Crawford, upon the death of Earl David in 1406, descended to, and * 537 was enjoyed by, his son Alexander, * the second Earl, upon whose death, in or before 1439, it descended to his son and heir David, the third Earl of Crawford. He was also styled Lord Lindsay, a title probably anterior in date to the Earldom of Crawford, but which thereafter, for many generations, descended with it to the heirs male of the family, to the exclusion of heirs female, whence it must be inferred that the Barony also was a male Honour, and, according to the adjudged law before mentioned, it must still descend in the same manner.

David, the third Earl, was killed in battle, in 1445, leaving two sons, Alexander, called in his father's lifetime "Master of Crawford," — a title common in Scotland to the eldest son, — who succeeded as the fourth Earl; and Walter, who became ancestor of the house of Edzell, — after mentioned as holding, in due course of law, the Earldom of Crawford. It is from that branch of the Lindsays, in the character of their direct male descendant, and also as heir male of David, the first grantee, that the Earl of Balcarras, on failure of nearer heirs male, claims to be entitled to both these Honours.

The said Alexander, fourth Earl, died in 1453, leaving two sons, David, the fifth Earl, and Alexander, named Sir Alexander Lindsay of Ochtermonsie. David, being a minor at his father's death, was ward to his uncle Walter during his minority. He was, in 1488, created Duke of Montrose (a title not now claimed), and died in or before the year 1497, leaving one surviving son,¹ John, who became sixth Earl of Crawford, and fell at the battle of Flodden in 1513, without issue. He left two sisters, Margaret * 538 and * Elizabeth Lindsay, coparceners of line, and heirs at

law, applicable to the ancient Peerages of Scotland, — all which are supposed to have been created by patents, — has probably governed the descent of the ancient Peerages of Ireland also, although it is not known how they were created. (See *The Slane Peerage Case*, 5 Clark & Finnelly, pp. 23, and 69.) But the ancient peerages of England, anterior to creations by patent in the time of Rich. II. were constituted by writ of summons to Parliament, and sitting therein, and are descendible in fee tail, that is, to the heirs general of the body of the first grantee. (See *The Vaux Peerage Case*, 5 Clark & Finnelly, 526; *The Braye and Camoys Cases*, 6 Clark & Finnelly, pp. 757, 789; and *The Hastings Peerage Case*, 8 Clark & Finnelly, 144.)

¹ An elder son had pre-deceased, without issue.

law not only of the said John, but also of all the antecedent Earls of Crawford and Lords Lindsay. Both these ladies married, and left issue, but neither of them, or their issue, succeeded to the Honours or to the estates which went to the collateral heir male, the said Sir Alexander Lindsay of Ochtermonsie. This was the first occasion on which female heirs were passed over.

Alexander, the seventh Earl, died in or before 1517, and was succeeded by his eldest son David, the eighth Earl, who died in 1542, leaving an only surviving son, Alexander, called the "Wicked Master," — wicked for having attempted the life of his father. Having thereby incurred the crime and penalties of parricide, according to the law of Scotland, he and his posterity became virtually extinct, and the succession to the Honours, and also to the estates, which were limited in strict entail, to heirs male, opened to the next collateral heir male. That was David Lindsay of Edzell, the great-grandson and lineal heir male of the said Walter, the first of that family, and direct ancestor of this claimant; and his succession affords sufficient proof of the extinction of all preferable heirs male, sprung from the main or eldest branch of the family. David having thus become the ninth Earl of Crawford, and Lord Lindsay, upon the death of the eighth, in 1542, had issue a son, also named David, to whom the dignities would in due course pass, but for the generosity of the father, who, considering that they had come to himself from the elder branch, and that the "Wicked Master" had left an only son, — who, though innocent of the father's crime, yet was involved in the consequences, — determined to surrender the Dignities to the Crown, in order that they might be reconveyed, together with the *estates, *539 — subject to his own life-rent and to the reversion to his descendants, — to the son of him who forfeited them. Accordingly, upon the death of David, the ninth Earl, in 1588, the Dignities returned from the collateral, to the first and principal line, and vested in David, son of the "Wicked Master," the ninth Earl. All this was done with the sanction of the Crown, by a sufficient instrument, to be given in evidence, and it will be further shown that this David was summoned to Parliament by the title of Earl of Crawford, which would of itself be conclusive upon his being in lawful possession of that Dignity.

It appears, therefore, that with the one exception, the Earldom descended regularly, in the direct male line, from the first Earl to the

tenth, who thus had in himself both Dignities, as if there was no interruption of the descent. He died in 1575, leaving four sons; David, Henry, John, and Alexander (created Lord Spynie by James VI.) and was succeeded by David, eleventh Earl, who was succeeded by his son David, twelfth Earl, who died in 1621, leaving only a daughter, Jane, who lived to 1663; but she did not enjoy the Dignities, which passed to the said Henry, next brother of her grandfather, and heir male of him and of her father. This was the second instance of exclusion of nearer heirs female.

Henry, the thirteenth Earl, had four sons, John, George, Alexander, and Ludovick. John died in his father's lifetime, leaving two daughters only, Margaret and Jean. They did not enjoy the Dignities, which, to their exclusion, — the third instance of the exclusion of heirs female, — passed to their uncle George, the fourteenth Earl, who also left only a daughter; and on his * 540 death, in 1628, his next brother, Alexander, succeeded * as fifteenth Earl, to the exclusion of the daughter. He died without issue, in 1639, when his next brother, Ludovick, succeeded to both the Dignities.

It appears, therefore, that down to this period, the honours descended lineally to the heirs male of the first grantee. The temporary enjoyment of them by David, ninth Earl, forms no exception; because by the constructive parricide of the "Wicked Master," he and his descendants were, as it were, rooted out of the succession, and David of Edzell succeeded, as nearest lawful heir male. On four different occasions, the heirs female of line were excluded. In *The Sutherland Case*, one instance of enjoyment by a female in 1514 was held to determine the course of descent of that Dignity, the original constitution of which, like the present, was unknown. The course of descent to males only, established fourfold in the succession to the Crawford Peerage, could not be changed except by some solemn counter-*rei-interventus* of later date, which was attempted thus: —

Ludovick, sixteenth Earl, having no issue, and being himself the last male descendant of the original grantee, in the main line, determined, in manifest injustice to the house of Edzell, the next heirs male, to divert the succession to another branch, and with that view he, being attached to Charles I. in 1642, prevailed on him to accept a surrender of the Earldom of Crawford, and to regrant that Dignity by a new patent, with the ancient precedency,

to himself and the heirs male of his body, whom failing, to John Earl of Lindsay of Byres, (the representative of a branch sprung from the main Crawford line of the Lindsays before the creation of the Earldom,) and the heirs male of his body, "*quibus deficientibus, hæredibus *masculis dicti Ludovici Comitis de *541 Crawford quibuscunque, cognomen et insignia familiæ de Crawfordi gerentibus.*" This patent, however unjust to the Edzell branch, was perfectly valid, being founded on an unexceptionable resignation of the Dignity, and new grant by the Crown, the fountain of Honours, and it became the regulating patent of the Earldom of Crawford. The only alteration made by it in the destination of the Earldom was the interpolation of the said Earl of Lindsay, and the heirs male of his body, on whose extinction, the Dignity was, in the very terms of the patent, to revert to the "heirs male whomsoever," of Ludovick. The Earl of Balcarras sustains that character, as well as the character of heir male of the body of Earl David, the first grantee.

On the death of Ludovick, without issue, the said John Earl of Lindsay succeeded, as seventeenth Earl of Crawford, and being a Covenanter, he obtained from the then Scotch Parliament a new patent, — even in Earl Ludovick's lifetime, and in exclusion of him, — extending the succession to his own heirs general; but that patent being void, as unauthorised by the King, and for other reasons, — not necessary to be stated, — no succession took place under it.¹ After the death of this John, in 1677, the Crawford Dignity descended lineally to his eldest son, grandson, and great-grandson, the eighteenth, nineteenth, and twentieth Earls. On the death of the last of these, without issue, in 1755, leaving two sisters, heirs of line, the Dignity passed over them, — another instance of exclusion of heirs female, proving that the original course of descent to heirs male was not altered by *the *542 patent of 1642, — and went to George Lindsay, fourth Viscount Garnock, who was the great-grandson and direct heir male of Patrick Lindsay of Kilbirnie, the second son of John, the seventeenth Earl. This George, the twenty-first Earl of Crawford, was succeeded by his son George, the twenty-second Earl, who died in 1808, without issue, whereupon the entire male line of the Lindsays of Byres, descended from John the seventeenth Earl, having been spent, the succession opened, in the terms of the last

¹ See rescissory Acts (Scotch) of 1661.

remainder in the patent of 1642, to the "heirs male whomsoever" of Earl Ludovick, the patentee. His nearest collateral heirs male, the Lindsays, Lords Spynie, who, like him, were descended from David, the tenth Earl, having also been extinct, from the year 1685, the Earldom of Crawford reverted to the Edzell branch, which, in 1808, was represented by Alexander, sixth Earl of Balcarras, who was then the heir male and lineal descendant of David of Edzell, the ninth Earl of Crawford before mentioned, being the great-great-grandson of Sir David Lindsay, first Earl of Balcarras, who was the son and heir of John Lindsay, second son of the said ninth Earl of Crawford, whose first son's issue male was extinct before 1750. Alexander, sixth Earl of Balcarras, — and, *de jure*, twenty-third Earl of Crawford, though he did not take that title, being ignorant of the existence of the patent of 1642, — died in 1825, and was succeeded, in all his Honours, by his only son, the present Earl of Balcarras, who claims not only to be Earl of Crawford, but also Lord Lindsay, which latter Dignity was not comprised in or affected by the patent of 1642, but descends to this claimant, as heir male not only of Ludovick, sixteenth Earl, but also of

* 543 David, third Earl of Crawford, the * first ascertained Lord Lindsay. The Barony has in fact been dormant since the death of Earl Ludovick.

Of the patent of 1642 there is no record, no registration, or enrolment, to be found; but the patent itself has been found, and will be produced in evidence. It has, like many ancient patents, lost its seal, but the attestation of the officer who countersigned it is perfect.

[LORD CAMPBELL. — There are many cases of ancient instruments having lost their seals, but the attestation being appended and verified, they have been held valid.]

The genuineness of the signature of Sir John Scott, of Scotstarvet, who was the proper officer to countersign this patent, will be verified, and the whole instrument, except the seal, will be produced. A similar instance occurred in the late investigation in the Annandale Peerage.¹ There the patent of the Earldom of Hartfell was admitted, although it wanted the seal, there remain-

¹ The claim to that Peerage — which was for a long time before the House — was in 1844 declared "not made out." It has not been reported, because the claimant presented a new petition, which, however, has not yet come on for hearing.

ing only part of the label or tag that connected the seal with the patent. Although it is perfectly immaterial to the Earl of Balcarras whether the patent of 1642 was ever granted or not, because he can establish his claim to the Dignities independently of it, as heir male of David, third Earl of Crawford, Lord Lindsay; still, as the patent has governed the descent of the Earldom for two centuries, and this claimant falls within the terms of the last remainder, to "the heirs male whomsoever" of Ludovick the patentee, he comes prepared to establish his right also under that patent.

* The evidence given in support of the claim was divided * 544 into six principal heads, corresponding with the branch lines of the claimant's pedigree. The first head comprised the descent of the Dignity of Crawford, in the direct line, from its creation to the date of the new patent, in 1642.

To prove that Sir David Lindsay was created Earl of Crawford on, or soon after, the 21st of April, 1398, Mr. Carnegie, writer to the signet, produced a copy of an old Exchequer Roll of the Great Chamberlain of Scotland, taken from the original in her Majesty's General Register House in Edinburgh, — the proper depository for all such public documents. It was entitled, "*Compotum Domini Roberti Ducis Albanie, &c., Camerarii Scotie, &c.*," being an account of the Chamberlain's official receipts and disbursements, from the 3d of June, 1397, to the 2d of May, 1398; and it contained an item of 69*l.* 6*s.* 4*d.*, for expenses of the King's household at Scone and at Perth, "*tempore quo tentum fuit scaccarium, quo etiam tempore tentum fuit consilium regis ibidem, super multis punctis et articulis necessariis pro negotiis regni et reipublice; et FACTUS FUIT DUX DE ROTHESAY, dominus David primogenitus Regis, Comes de Carric; et Dominus Robertus, germanus Regis Comes de Ffyf et Menteth, FACTUS FUIT DUX ALBANIE; et DOMINUS DAVID DE LINDESAY, FACTUS FUIT COMES DE CRAWFORDE,*" &c.

Witness said that this copy was made by a clerk in the Register House, and it was compared with the original with the assistance of Mr. Home, another clerk, much experienced in reading and copying ancient writings, who first read the original, while witness perused the copy, and then read the copy while witness held the * original; he would not say positively that he could * 545 read and understand the original, which was in the old character, without taking more time.

The Lord Chancellor (Lord Lyndhurst), and Lord Brougham,¹ and other Lords of the Committee, said they were of opinion that a witness should be brought, who could speak from his own knowledge of the correctness of the copy.

Mr. Home was accordingly brought, and examined on a subsequent day. He said he was a writing clerk in her Majesty's Chancery Office; was conversant with the Latin, and the handwriting of the period of the date of this document; he and Mr. Carnegie compared the copy with the original, interchangeably, that is, witness reading the original, Carnegie looking at the copy, *et vice versa*. The copy was made by Mr. Lowe, a clerk in the Register House, and was a correct copy.

Mr. Lowe also was examined. He said he made this copy from the original, and had acquaintance enough with the Latin and writing of the periods as to be able to say this was a correct copy; it contained the same abbreviations as the original.

The document was then received, and Mr. Carnegie read the material passages.

Lord Brougham said, all that the committee decided was, that the witnesses were competent, and the document admissible; its effect was to be matter of future consideration when the evidence was printed.

The claimant's counsel suggested that it would be a
* 546 * saving of expense to the claimant, and useful to the committee, if, instead of printing this and other documents at length, the agents for the claimant and the Crown would select for printing such parts of them as were material.

The Lord Advocate assented, and the Lords of the Committee approved of that course.

To prove that there was an Earl of Crawford in Scotland in the year 1398, a Scotch Roll of the 19th of October, of that year, being the 22d Richard II. of England, was produced by a clerk from the Record Office of the Tower of London, and he read an extract therefrom, purporting to be a safe conduct to David Earl of Crawford, to come into England with thirty knights in his train. An examined copy of the extract was delivered in, and

¹ Their Lordships, and also the Earl of Devon, Lord Campbell, and Lord Redesdale generally attended in the Committee. Lord Cottenham did not attend until 1847, when, being Lord Chancellor, he attended regularly.

five similar Scotch Rolls were produced consecutively from the Tower,¹ the first being of the 6th year of Henry IV. (1405), giving a safe conduct to England to the same David Earl of Crawford; the second being of the 8th & 9th Henry IV. (1407), giving a safe conduct to Alexander Earl of Crawford; a third being of the 9th & 10th of Henry V. (1421), containing the names of hostages for James the First, King of Scotland, and among them Alexander Earl of Crawford; the fourth being of the 19th of Henry VI. (1438) appointing conservators of the truce between England and Scotland, among them the said Alexander Earl of Crawford; and the fifth being a treaty in the 31st of Henry VI. (1453) between the two kingdoms, contracted by certain commissioners, including, on the part of Scotland, Alexander Earl of Crawford.² * The material parts of all * 547 these rolls were read, and examined copies of the extracts were delivered in.³

Various charters, *compotums*, and other documents of a public nature, were produced from the General Register House in Edinburgh, and also deeds of entail and settlement, from family-muniment repositories, to show that David, the first Earl, died in 1406, and left a son, Alexander, who was the second Earl of Crawford, and that he was succeeded by his son David, third Earl, who in some of these documents was also called Lord Lindsay. It appeared by the further evidence that the successors of this David in the Earldom were also respectively called Lord Lindsay, down to and inclusive of Ludovick, the sixteenth Earl of Crawford.

The *Rotuli Scotiæ*, printed by the Record Commis-
Printed copies of records rejected, the originals being accessible.
 sioners, were offered to show by one of them, with other evidence, that David, son of Alexander, the fourth Earl, succeeded him in 1453-54, and afterwards on at-

¹ *Rotuli Scotiæ*, in the Tower of London.

² This was Alexander, not the second, but fourth, Earl.

³ The claimant's agents were prepared with extracts from contemporary historians, as Bower (vol. ii. p. 422, ed. Goodal) and Wynton (vol. ii. p. 381, ed. Macpherson), stating that Sir David Lindsay was created Earl of Crawford in 1398; but the counsel did not offer them in evidence, conceiving that the creation of the dignity had been sufficiently proved by the documents already admitted; nor was it certain that the Lords would admit them, having rejected similar extracts upon a claim to an English peerage. See *The Vaux Peerage Case*, 5 Clark & Finnelly, at p. 538.

taining his age, sat in the General Council or Parliament of Scotland, as Earl of Crawford (the fifth) and Lord Lindsay, but were rejected, because it was not shown that the original roll was not extant. This was afterwards produced and admitted.

* 548 * To prove that John, son of this David, and sixth Earl of Crawford, left two sisters, his heirs of line surviving, yet that he was succeeded in the Earldom, and also in the title of Lord Lindsay, by his uncle Alexander Lindsay of Ochtermonsie, second son of Alexander, fourth Earl, in exclusion of the sisters, an act or order of the Supreme Civil Court, dated in 1515, mentioning "Margaret Lindsay and Elizabeth Lindsay, sisters and heirs of the late (*umquhile*) John Earl of Crawford," as parties to the cause; and also an Act of Parliament or General Council held at Perth in 1513, and entered in the *Acta Dominorum Concilii*, in which this Alexander was mentioned as Earl of Crawford; and also an act of a General Council held in Edinburgh in 1515, mentioning this Alexander Earl of Crawford as heir and successor of John Earl of Crawford, his nephew, were produced from the General Register House, and were admitted. And to show the devolution of the Crawford estates in the same manner, a deed of entail and a royal charter of confirmation thereof, obtained by David, fifth Earl, in 1474, limiting the estates to him and "the heirs *male* of his body, whom failing, to his heirs *male* whomsoever," were produced from the proper custody, and admitted.

To prove the forfeiture of the succession by Alexander, the "Wicked Master," — for himself and the heirs of his body only, — and that upon the death of his father, eighth Earl in 1542, the dignities and estates passed to David Lindsay of Edzell, as the next collateral heir male, the record of the indictment and conviction of the said "Wicked Master" and *quasi* parricide for laying violent hands on his father, before the High Court of Justiciary in 1530, and several royal charters, including the said charter

* 549 of entail of 1474, and other * documents, some of a public, others of a private nature, all produced from the proper repositories, were put in evidence. The subsequent resignation and conveyance of the estates by David, ninth Earl, in favour of David, son of the "Wicked Master," — with reservation of his own life interest and of his descendants' right of succession in failure of direct heirs male of the last-named David, — was proved by a bond or obligation entered into by him, reciting the convic-

tion, &c. of his father, and the proposed resignation by the ninth Earl; by the instrument of resignation, and by a royal charter of confirmation, all dated in 1546; and the succession of David, the tenth Earl,—so restored,—was proved by a summons to Parliament in 1554, and by special retours, dated respectively in 1562 and 1594.

To prove that David, twelfth Earl, died in 1621 without male issue, leaving an only daughter, Lady Jean, his heir of line, surviving, yet that she was passed over (the second instance of exclusion of heirs female), and the estates and dignities descended to her grand-uncle, Sir Harry Lindsay, of Carrieston, who was the second son of the tenth Earl, and, being then the nearest heir male, became thirteenth Earl.

Numerous instruments — including a grant of a pension by Charles II., in 1663, to “Ladie Jeane Lindsay, onlie daughter to the deceased David Erle of Crawford,” decrees of Court, special retours, acts and rolls of Parliament, and royal charters of entail, — some of which were previously adduced for other purposes, — were produced and admitted, some absolutely, and some only *de bene esse*. To prove that John, eldest son of Henry, thirteenth Earl, &c. predeceased his father in 1615, and left issue only two daughters, and that on the death of the thirteenth Earl in 1627, the estates and dignities, * in exclusion of these two * 550 granddaughters and heirs of line then alive, passed to his second son, George, who then, as nearest heir male, became fourteenth Earl.

A charter by James VI., dated 1614, an interlocutor of the Supreme Civil Court in 1618, a deed of contract dated in 1625, duly registered, mentioning “George Earl of Crawford Lord Lindsay,” as a party thereto, letters of inhibition in 1627, at the instance of “Margaret and Jean Lindesayes, onlie lawfull daughters and aeris,” &c. “of *umquhile* Sir John Lindsey,” &c. were produced, with other evidence, and admitted. And in proof of the fourth instance of exclusion of females from the succession to the Honours, it was shown by a charter of 1631, by general retours of 1639 and 1653, and by a roll of the nobles present in the Parliament of 1635, — containing a protest by “Ludovick Earl of Crawford,” in support of his precedence, — that on the death of George fourteenth Earl, leaving a daughter Margaret, his only child and heir of line, she was passed over, and her uncle Alexan-

der, next brother of George, succeeded ; and that on his death in 1639 without issue, the said Margaret still living, the dignities and estates were possessed by the said Ludovick, sixteenth Earl, who was a younger brother of the said George and Alexander.

A patent without a seal or any record of it, admitted, on proof of the attestation. To prove that Earl Ludovick resigned the Earldom to the Crown, in 1642, and obtained a re-grant and patent thereof, with the original precedence, to him and the heirs *male* of his body, to be procreated, — he then having no children, — remainder to John Earl of Lindsay, and the heirs *male* of his body, remainder to Earl Ludovick's heirs *male whomsoever*, the patent itself was offered to be put in evidence.

Objections to its reception were taken by the Attorney-
* 551 General * and Lord Advocate, on the grounds that it was not registered or otherwise authenticated as genuine, and that there was no seal to it.

To meet these objections, numerous witnesses were examined, and it was shown, first, that the register for the year 1642 was defective, twelve folios being wanting in that part where the patent ought to be recorded, according to the reference in the index, mentioning “ *Diploma Ludovici Comitis de Crawfordie* ” ; secondly, that the patent was produced from the proper custody, having been first found among the title deeds to the Crawford estates in the muniment-room of Lady Mary Lindsay, who was the sole surviving sister and heir of George, the twenty-second and last Earl, and died without issue in 1833, when all these title deeds were inventoried and taken into the custody of the sheriff and other official persons, pending a litigation in respect of the estates, and afterwards of the agents of the Earl of Glasgow, after his right to the succession to the estates, under a modern entail, was established, and by these agents the patent was produced ; and, thirdly, that the words indorsed on the patent, “ sealed the 27th January, 1642, Ro. Haldane ” ; and “ written to the Great Seal, 25th January, 1642, J. Scottistavrett,” imported actual sealing of the patent, or were equivalent thereto, and that the word “ regrat,” also indorsed, coupled with the former words, meant that the instrument was registered. That J. Scott, of Scottistavrett, was, in 1642, “ Director of Chancery,” the proper officer to attest patents, was shown by production of the instruments of his and his successor's appointments ; and the witnesses who spoke to the

genuineness of the signature, "J. Scottistavett," said they acquired and had in their minds a distinct knowledge of it from seeing it affixed * to other ancient documents in the * 552 Register House, which were always admitted to be genuine.

The patent was held by the Committee to be admissible, and was read as follows: —

Carolus Dei Gratia, &c. *Sciatis nos dedisse et concessisse tenoreq' p'ntium dare et concedere predilecto nostro consanguineo Ludovico comiti de Crawford ac heredibus masculis de corpore suo legitime procreandis, quibus deficientibus predilecto nostro consanguineo et consiliario Joanni comiti de Lindsay ac heredibus masculis de corpore suo procreatis seu procreandis, quibus deficientibus heredibus masculis dicti Ludovici comitis de Crawford quibuscunq' cognomen et insignia familiæ de Crawford geren', titulum et dignitatem ad dictum Ludovicum comitem de Crawford spectan' tanquam heredem deservitum et retornatum majoribus suis antiquis comitibus de Crawford a multis retro seculis in dicto honore et dignitate; quiquidem titulus honoris et dignitatis dimissus et resignatus fuit per eum eiusq' procuratores eius nomine in manibus nostris pro hac p'nti renovatione eiusdem memorato Ludovico comiti de Crawford ac heredibus masculis de corpore suo procreandis, quibus deficientibus, &c.* (The above limitations were repeated.) Preterea nos ob multa preclara servitia nobis et nostris illustrissimis progenitoribus per dict' Ludovicum comitem de Crawford et Joannem comitem de Lindsay eorumq' prædecessores prestita dedimus et concessimus tenoreq' p'ntium damus et concedimus memorato Ludovici comiti de Crawford ac heredibus masculis de corpore suo procreandis, quibus deficientibus dicto Joanni, &c. (the limitations again repeated), dictum, titulum honorem et dignitatem comitum de Crawford secundum antiquam precedentiam aliaq' privilegia comitibus de Crawford a data eorum primæ creationis in comites debita vel secundum alia diplomata et autentica scripta continen' tempora et datas dict' tituli et dignitatis comitatus per eos secundum datas eorundem omni tempore futuro fruend'; Tenendum et habendum totum et integrum predictum titulum honorem et dignitatem memoratis Ludovico comiti de Crawford, &c. In cujus rei testimonium p'ntibus magnum sigillum nostrum apponi precepimus. Apud aulam nostram de Windisore, 1642. — *Per Signaturam S. D. N. Regis supra script.*

The following words were indorsed: "Sealit, 27th January, 1642, Ro. Haldane," and "written to the Great Seall, 25th January, 1642, J. Scottistavett."

Under the second head of evidence were comprised documents of various kinds, — as, deeds and charters of entail and confirmation, enfeoffments, special and general *retours, * 553 Parliament Rolls, Exchequer Rolls and charters, decrees of Court and adjudications, &c., — showing the death of Ludovick, the 16th Earl of Crawford Lord Lindsay, in or about 1648, without issue, and the succession of John Earl of Lindsay (of the Byres

Branch), as 17th Earl of Crawford (with the original precedency), under the first remainder in the patent of 1642, and the descent of the Earldom to his eldest son and grandson and great-grandson, the 18th, 19th, and 20th Earls, on the death of the last of whom, leaving only sisters his heirs, the Earldom passed over them to the male descendants of the 17th Earl's second son, namely, George, 4th Viscount Garnock, the 21st Earl, and on his death to his son George, 22d and last Earl, who died in 1808, leaving Lady Mary Lindsay, before mentioned, his sister and heir.

No objection was made to the admission of these documents.

The evidence under the third, fourth, and fifth heads, consisting principally of similar documents, went to extinguish the representatives of the several branches of the Lindsays, prior in right to the Balcarras (the claimant's) branch; and, first as to the Spynie Branch, descended from a younger son of the 10th Earl of Crawford, the counsel for the claimant proposed to put in, among other evidence, minutes of proceedings before the House, in 1785, upon the claim of Colonel Fullarton to the Barony of Spynie, wherein it appeared that the then Attorney-General, on behalf of the Crown, had admitted the correctness of the pedigree exhibited by that claimant, showing that the last heir male of that branch was dead.

An admission by the Attorney-General in a peerage case is not binding on a subsequent committee.¹

The Committee, upon objection taken by the Lord Advocate, decided that such an admission was of no * value in the present case. Their Lordships, however, received the minutes, *quantum valeant*, for other purposes, especially the final resolution of the House, which was "that, although the original creation of the Barony of Spynie had not been shown, yet it appeared from the evidence that the descent was limited to heirs male, and consequently that Colonel Fullarton, claiming through a female, had no right to the peerage." From this resolution, and from the non-appearance of any heir male on that occasion, the counsel for the claimant in the present case argued, that it should be presumed that the heirs male in the Spynie line were long extinct; *de non apparentibus et de non existentibus eadem est ratio*. In *The Roscommon Peerage Case*,² Lord Redesdale said, that non-claim by heirs male in that case was just ground to presume that none existed.

The evidence after extinguishing the younger sons of the 7th

¹ See 3 House of Lords Cases, 827 note.

² 6 Clark & Finnelly, at p. 127.

and 8th Earls, proceeded to the extinction of the male descendants of the eldest son of David of Edzell, 9th Earl.

The Attorney-General submitted, in respect to several of the documents offered in evidence for that purpose, that proofs should be given of the genuineness of the signatures.

The Committee held, that as the documents had all the appearance of old official instruments, and came from the proper custody, — the custody in which they would be, if genuine, — they ought to be admitted, with liberty, however, to the Attorney-General to show afterwards, by reference to authorities, that further proof of their genuineness should be given.

* The claimant's counsel, in reply to a question from the * 555 Attorney-General, said they had no evidence showing the existence or extinction of several persons named in the Pedigree; that those names were inserted because they were mentioned in Peerage Books, in which it was also stated that they had died without issue.

The Attorney-General submitted that Peerage Books were not to be received in evidence, and, if they were to be so offered, notice thereof should have been given.

Lord Lyndhurst, and other Lords of the Committee, said that as the Peerage Books, in which alone those persons' names were found, stated also their deaths without issue, they were in fact extinguished by the same evidence that raised them, as Lord Redesdale said in another case.¹

The Reverend David Lyell, a witness aged seventy-six, descended from a female of the elder Edzell line, said he heard from his father and aunts, who all died at great ages before the year 1800, that David Lindsay, who died in 1744, was the last male heir of that line, and that the estates belonging to that family came by purchase to the families of Lord Panmure, Lord Balcarras, and the Fotheringhams. The ancient title deeds to the estates were produced from the muniment chests of those families, in further proof of the extinction of male heirs of the Edzell branch, and much parol testimony leading to that conclusion was given by witnesses who were descended from females of that branch, and spoke of conversations and traditions in their families.

In proof of the extinction of the Lindsays of the Garnock branch of the Byres line, the following evidence was given: * 556 first, proceedings in 1746, in * an administration of the

¹ The Roscommon Peerage, 6 Clark & Finnelly, at pp. 129, 130.

goods of Charles Crawford (of that branch), "a bachelor," granted to Neal McNeal of Ugadale, "the husband and lawful attorney of Margaret Crawford, sister and next of kin of the deceased," were produced from Doctors' Commons. Next the power of attorney signed "Margaret Crawford," authorising her said husband to sue out the administration, was produced from the Ugadale charter chest, and received. Then two letters, produced from the Ugadale chest, purporting to have been written by Margaret Crawford to relations, one of them dated 1764, being signed by her were offered to be put in.

The counsel for the Crown objected to the reception of these letters, first, because they were not produced from the proper custody, — which they contended was the custody of the persons to whom they purported to have been written, or their descendants; and, secondly, because the handwriting was not verified.

The witness who produced them said he found them with the power of attorney, and other documents and letters signed Margaret Crawford, in the muniment chest of the McNeals, of Ugadale. They were without post-mark or folding, and appeared to be drafts or reserved copies, — though not so marked, — in holograph of the party, whose signature, "Margaret Crawford," was to one of them. He considered it possible that the one dated 1764, and signed, was a draft, and that a copy was written and sent to the party (Lord Bute), to whom it was addressed.

Another witness (Mr. Melville, from the General Register House in Edinburgh), much accustomed to documents in old handwriting, said he had, on a former day, most carefully and repeatedly inspected the signature "Margaret Crawford,"

* 557 to the power of attorney * (before received), so as to be able, from the knowledge acquired by him of the character of the handwriting from such inspection of that signature, and of the same signature to other documents, to say, without immediate comparison or reference to it, that these letters, particularly the signature to one of them, were written by the same hand.

The Committee received both letters, at first *de bene esse*, subject to argument at a future sitting, as to their absolute admissibility. Their Lordships, at a subsequent sitting, held, without hearing any argument, that the letter signed "Margaret Crawford" was admissible as a declaration of the state of the family by a member of the family.

The second letter appearing afterwards to be very material to meet objections made by the Lord Advocate to the incompleteness of the extinctions in the Garnock line, Mr. Melville was again brought, and being examined, and cross-examined at great length, he answered to this effect; that from having repeatedly examined the letter last admitted, and the signature to it, as well as the signature to the power of attorney previously admitted, he had such knowledge and distinct impression in his mind of the handwriting, that he should be able to say whether or not any other letter shown to him was written by the same person, and that, without immediate comparison of the signatures or letters. This letter being then shown to him, he said "he believed, in fact he had no doubt, it was written by the same person who wrote the letter signed 'Margaret Crawford.'"

The Committee, after hearing the question of the admissibility of this letter argued at great length, by the * counsel for the claimant and for * 558 the Crown,¹ decided that it was admissible as a declaration, like the former, of the state of the family, and, in that view of it, coming from the proper custody.

The evidence adduced under the sixth and last head went to show the descent of the claimant from David Lindsay, of Edzell, ninth Earl of Crawford and Lord Lindsay, through his second son John Lindsay, of Balcarras, whose lineal male descendant, James 5th Earl of Balcarras, and grandfather of the claimant, became, in 1744, the nearest heir male of the Lindsay, of Crawford and Lindsay of Edzell lines, on the death, without issue in that year of David Lindsay, the then male heir of both lines.

Lord Lindsay, the claimant's eldest son, examined as a witness, said he had given much attention to genealogies and pedigrees, especially those of his own family. He produced a MS. book on

A person accustomed to ancient manuscripts, saying that by a careful examination of certain signatures, he had in his mind such a distinct knowledge of the handwriting as to be able to say without immediate reference to them, whether any letter shown to him was or was not written by the same person: Held, a competent witness.

¹ The arguments were in substance the same as those reported on a similar point in The Fitzwalter Peerage Case, 10 Clark & Finnelly, pp. 196 and 197; and the cases and authorities there mentioned were referred to; and the authority of the decision in that case itself, against the reception of such evidence, was urged by the counsel for the Crown, who also cited *Doe v. Suckermore*, 5 Adolphus & Ellis, 703. The claimant's counsel cited *The Bishop of Meath v. The Marquess of Winchester*, 4 Clark & Finnelly, 445, for receiving the letter as a declaration of the state of the family by a member of it.

the subject, written partly by his great-grandfather, fifth Earl of Balcarras, — *ante litem motam*, — for the use of the family, and not to prove a claim to dignities or property, and continued by his daughter, Lady Anne Barnard, who bequeathed it to the claimant. Witness had become perfectly acquainted with the handwriting of the 5th Earl, by perusal of leases and other documents signed by him and duly witnessed, and acted upon as genuine, besides

* 559 * letters to Lady Barnard, which bore internal evidence of having been written by him. The witness being declared competent, read, by direction of counsel, several passages from that part of the book, written by the said Earl, one of which was that “ Lindsay Earl of Balcarras was heir male of the Lindsays of Edzell, extinct in 1744, who were heirs male of Lindsay Earl of Crawford.”

Statements in writing by a deceased person of facts within his knowledge relating to the state of his family, without a view to a suit or claim of peerage, are admissible in proof of pedigree.

LORD BROUGHAM. — This is certainly a very curious book ; but how is it to be admissible evidence ? It is proved to be in the handwriting of the Earl by whom it purports to have been written, but it is still a private document, kept in *retentis*, not exhibited in the family to all beholders, and it therefore fails to have those characteristics which make such exhibited documents evidence.

Sir F. Kelly. — It is offered as evidence on this principle, that it is a statement by a deceased member of a family in a matter of pedigree of that family.

LORD CAMPBELL. — There is no doubt about the correctness of the principle.

LORD BROUGHAM. — An entry of a fact within the party’s own knowledge is evidence.

LORD LYNTHURST. — Any declaration made by him *ante litem*, and without suspicion of motive, is evidence.

THE LORD ADVOCATE. — This stands on the same ground on which Mrs. Margaret Crawford’s letters were received.

Sir F. Kelly. — The Earl, who made these entries, died in 1768, and, therefore, could not have made them with any view to a claim to a dignity, which was then, and until 1808, in another family ; he was born about 1690, and therefore, besides being, as it appears by the book, a great genealogist, he may be presumed to be
* 560 * acquainted from 1705 with the state of his near relations, and those of whom he writes lived, as appears, *aliunde*, be-

tween 1705 and 1744. These entries are, therefore, admissible as declarations of facts which were within his own knowledge.

On that ground the Committee held them to be admissible.

1847. July 5.

Mr. Stuart-Wortley, in proceeding to sum up the evidence, first reminded the Committee that the Earl of Balcarras claimed the Earldom of Crawford, as lineal heir male of the body of David, the third Earl, who was the only son of Alexander, the only son of Sir David, the first Earl. He also made out his claim as collateral heir male, or "heir male whomsoever," of Ludovick, the 16th Earl, who, upon his resignation of the Earldom in 1642, obtained from the Crown a new charter, limiting that dignity, first, to the heirs male of his own body, remainder to John Earl of Lindsay, of the Byres, — a remote branch of the Lindsays, — and the heirs of his body, "whom failing, to the heirs male whomsoever" of the said Ludovick. The heirs male of the Byres branch having become extinct on the death of George, 22d Earl of Crawford, in 1808, the Earldom descended under the ultimate remainder to the nearest collateral heirs male of Ludovick, in which position it is clearly shown by the evidence that the claimant stands.

Of the ancient Barony of Lindsay there was no patent extant, but ancient instruments had been put in evidence, showing that David, the third Earl, bore that title, in addition to the title of Earl of Crawford; that Alexander, his son, and David, his grandson, the fourth and fifth Earls, bore it; that David, the ninth Earl, — of * the Edzell branch, and immediate ancestor of * 561 the claimant, — bore it, and that the title was ascribed to succeeding Earls in Acts and Rolls of Parliament, and instruments under the hand of the Crown, down to Ludovick the sixteenth Earl. But the claimant's right to the Barony depended exclusively on his descent, as heir male of the body of David, the third Earl, whereas the Earldom may be claimed by him in that character or as next collateral heir male of Ludovick, the sixteenth Earl, under the ultimate remainder in the patent of 1642.

The creation of the Earldom in 1398 was proved, by unquestionable evidence, although there was no patent found, nor any other instrument showing the limitations. In that case the rule of the House was, where nothing appeared to mark the course of

descent, to presume that the limitations were to the heirs male of the body of the original grantee,¹ or, if in the course of the descent, a certain mode of enjoyment of the Peerage was established, even by a single instance, as in *The Sutherland Peerage*,² then the presumption of law was, that such enjoyment was according to the limitations in the patent. But the course of descent of both these Peerages was minutely traced, and it was shown by the clearest evidence that heirs female — heirs of line and heirs general of the deceased possessor and of the first grantee — were passed over on many occasions, proving that these are male honours, and must ever descend to heirs male only, and so far
 * 562 fortifying the * presumption which, without any evidence of the descent, this House would entertain.

The creation of the Earldom in 1398, at Perth, has been proved by the *compotum*, which is a form of account, and discharge of a public officer. The recognition of David Earl of Crawford in the same year is proved by the instrument of safe conduct given to him by Richard II. of England, to journey to London with a large retinue, to meet Lord Wells in a tournament on London Bridge, — in which the chroniclers of the time relate that the illustrious Earl vanquished his far-famed rival.

The creation of the Earldom, and the existence of the Barony also, in David, the third Earl, having been proved, it was not necessary to trace the descent of them step by step; it was sufficient to call attention to those successions which were marked by the exclusion of heirs female, and to events which disturbed the regular course of descent, and to show how that disturbance is accounted for, and how it strengthens the claimant's case.

The third Earl left two sons, Alexander, who succeeded him, and Walter, who became the head of the Edzell line, and was the ancestor of the claimant. Alexander was succeeded by his son David, fifth Earl, who was, in 1488, created Duke of Montrose, with descent to his heirs male,³ but that creation was revoked by

¹ Per Lord Mansfield, in *The Spynie Peerage* (Maidment's Report); and Lord Eldon in *The Annandale Peerage*, cited in Sir H. Nicolas's Report of *The Devon Peerage*, pp. 56, 57.

² Vide ante, note, p. 536.

³ The noble claimant, after the decision in his favour in the present case, petitioned the Queen to be declared entitled to the Dukedom also, and his petition has been by her Majesty referred to the House, but there has yet been no sitting of the Committee on it.

the Crown, and the Dukedom was limited to him for his life only. It was proved that this fifth Earl's * eldest son * 563 had two sons and two daughters, and that his eldest son predeceased him, without leaving issue, and that he was succeeded by his second son, John, who perished in battle at Flodden, without issue, leaving his two sisters heirs at law of him and of the fifth Earl, and of all the preceding Earls. The honours, however, did not go to them, but passed to their uncle, Sir Alexander Lindsay of Ochtermonsie. That instance of exclusion of females would be sufficient to establish the course of descent of these honours to male heirs only, as the single instance of the succession of an heir female to the Earldom of Sutherland (in 1514) was held in 1772 to define that dignity as descendible to female, as well as male, heirs. The evidence in this case shows several other instances of the exclusion of females; but at a date, prior to them, a very remarkable disturbance occurred in the descent of these honours: David, the eighth Earl (eldest son of the last-named Alexander, seventh Earl), was not succeeded by his son Alexander, "Master of Crawford." The word "Master" in Scotland means heir apparent; — but this Alexander, having obtained an unhappy reputation, was called the "Wicked Master," from his having, with other wicked associates, committed great outrages, and used violence to his father, which, by the law of Scotland, is constructive parricide. The record of the indictment and proceeding on it for that offence has been put in evidence, and it appears by it that the accused "came under the pleasure of the Crown," which means, that they pleaded guilty. The words of the record, after stating the offence charged, are "*pro quibus criminibus dictæ personæ in voluntate Supremi Domini nostri Regis, tunc personaliter presentis, devenerunt.*" The legal consequence to the "Wicked Master," of this confession of guilt, — equal to * conviction, * 564 — with judgment following on it, was that he forfeited, as well for the heirs of his body as for himself, all right to the succession to his father.¹ That he was guilty of constructive parricide, and thereby "forfeited and lost all right to the honours and estates," is acknowledged by his son, who was restored to them, and is recorded in a solemn instrument executed by him, and which is in evidence. It further appears that the father, eighth Earl, determined to convey his estates, subject to his life-rent, to

¹ Craig Jus. Feudale, Lib. III. dieg. 6, § 3.

his nearest relation and heir, David Lindsay, descended in the third degree from Walter of Edzell. The very deeds carrying that determination into effect have been put in evidence. There is then a charter of King James, dated 1541, confirming the conveyance of the estates, and the destination thereof, to David of Edzell, "*Dilecto nostro Davidi Lindesay de Edzell et heredibus suis subscriptis omnes et singulas terras et Baronias subscriptas, videlicet* (they are enumerated), *quæquidem terræ Baronie, &c., fuerunt consanguinei nostri Davidis, comitis Crawfordie per prius hereditarie,*" &c. How the dignities passed to this David, — who undoubtedly enjoyed them, — the claimant and his agents, with all their diligence, have not been able to prove distinctly. The estates only were conveyed by the deeds and royal charter. It was not unusual, in former times, in Scotland probably, as in England, for titles of honour to accompany the possession of estates, or it may have been, — though there is no proof of it, — that David, eighth Earl, resigned the honours, — as Ludovick, the sixteenth Earl, certainly did in 1642, — to the Crown, and the Crown re-

* 565 granted them to David, the new possessor of the * estates.

It is certain that he, after the death of the eighth Earl, and while the "Wicked Master" was living, took the title and sat in Parliament as Earl of Crawford, and there is in evidence a precept or summons to Parliament in 1554, directed to him by Queen Mary, not only as Earl of Crawford, but also as Lord Lindsay: "*Maria Dei gratia regina Scotorum dilecto nostro consanguineo Davidi comiti Crawfordie domino Lindesay salutem. Quia ordinavimus Parliamentum, &c., precipimus quatenus sitis ibidem in dicto die coram nobis in dicto nostro Parlamento,*" &c. The Parliament Rolls given in evidence show that this David sat in that and in other Parliaments. This evidence then amounts to conclusive proof and recognition of both dignities being in David of Edzell, — who was the father of John Lindsay of Balcarras, from whom the present claimant of those dignities is lineally descended, — and the reasonable presumption is, either that they were regranted to him by the Crown on the resignation of the eighth Earl, or that on his death they passed to him by regular descent, as his next heir male, after the forfeiture of the succession by the "Wicked Master"; because in that case he actually became the next heir of David, the eighth Earl, being the lineal heir male of the body of David, the third Earl, and that is the most probable solution of the matter. The

subsequent restoration of the estates and honours to David, son of the "Wicked Master," is proved by various documents, first, a reconveyance of the estates by the ninth Earl, who, although he had sons of his own, capable and of right entitled to succeed him, yet taking compassion on the innocent son of the "Wicked Master," adopted him as his own, and reconveyed to him the whole of the estates, reserving his own life interest. There is, *next, a charter of Queen Mary, confirming the reconvey- *566
ance to the grandson of the last (the eighth) Earl: "*Dilecto nostro Davidi Lindsay nepoti* (which here means grandson) *quondam Davidis Crawfordie comitis ultimi defuncti omnes et singulas terras, &c.* (they are enumerated), *quæquidem omnes, &c., fuerunt Davidis nunc Crawfordie comitis proprius hereditarie,*" &c.

There is then a regular sequence of conveyances and confirmations, first, from David, the eighth Earl, to David of Edzell, ninth Earl, and from him to David, the eighth Earl's grandson, who became tenth Earl. There is also a solemn bond and obligation, before referred to, as executed by this David, with the advice of his guardians and relatives, and other great persons in 1546, in the Cathedral of Brechin, and wherein he narrates the whole of the transactions to this effect: first, "that in consequence of the ingratitude of his father, and wrongs of the late Alexander, Master of Crawford, to the late Earl his father, through which he, the said Alexander, by law forfeited the succession, the said late Earl resigned all his lands, &c. and heritage of the Earldom of Crawford into the late King's hands, for infeftment thereof to be made to David now Earl of Crawford, nearest heir of tailzie," — (a declaration very important to the present claimant, as a recognition that his ancestor, David of Edzell, ninth Earl, was next heir to David, the eighth Earl, the elder branch of the Lindsays), — "yet David, now Earl of Crawford, moved by pity, &c. has adopted me as his son, and has resigned all the said lands into our Sovereign Lady's hands, for inheritable infeftment to be made to me and my heirs male of my body, which failing, to the heirs male of tailzie of the said David, now Earl, specified in *the infeftment of fee and charter tailzie, lately made by *567
our late Sovereign to him; therefore I with consent of my curators (named) bind and oblige myself, my heirs, &c. to be good sons to David, now Earl, all the days of his life," &c. The bond then goes on to bind him, in case of his failing in duty as afore-

said to the then Earl, to resign to him all the said lands, &c. No evidence can be more satisfactory than that narrative in proof and explanation of the disturbance that took place on that occasion, in the descent of these honours.

This David proving dutiful, as he pledged himself, to his benefactor, was, on his death, restored to the honours as well as the estates; for there is in evidence a Roll of Parliament showing that he sat therein as Earl of Crawford in 1558; and there are other instruments showing that he enjoyed the title of Lord Lindsay. He was succeeded by his son David, eleventh Earl, who was succeeded by his son David, twelfth Earl, who having an only daughter, there then occurred a second instance of the titles passing from female heirs, by the succession of the twelfth Earl's uncle, Sir Henry, on whose death they again passed over the daughters of his eldest son, predeceased, to his second son George, the fourteenth Earl, whose successor was, not his daughter, his only child and heir at law, but his younger brother Alexander, who, dying without issue, was succeeded by his next brother Ludovick, the sixteenth Earl. There is unquestionable evidence before the Committee of these several successions of male heirs, in exclusion of females, heirs at law. There are altogether four instances of such exclusions, establishing, beyond a possibility of doubt, that these ancient dignities were descendible only to heirs male.

*568 *The next point requiring particular notice is the disturbance in the descent of the Earldom on the death of Ludovick, the sixteenth Earl, which happened thus: He was in great favour with King Charles the First, and so also was his kinsman, John Lindsay of Byres, created Earl of Lindsay in 1633. It appears that Earl Ludovick having no children to succeed him, was prevailed on by his said kinsman to resign the honours of Crawford to the King, who thereupon granted a new patent, varying the course of descent, which, by the law of Scotland before the Union, was competent for the Crown to do, as appears from the observations of Lord Brougham in *The Devon Peerage*.¹

The Lord Advocate, in answer to questions from Lord Brougham, said the Crown might have dealt with honours on resignation of them by the holders, as he might with landed estates, and there were in Scotland many instances of honours being surrendered to the prejudice of parties entitled to succeed under existing patents, and being

¹ Sir H. Nicolas's Rep. 53.

regranted to others ; but to effect that, not only the consent of the Crown, but such consent exhibited by sign manual, was necessary.¹

Mr. Wortley. — The patent effecting the purpose in this case has, after a great deal of inquiry and examination, been received by the Committee.² It is dated in 1642, and limits the Earldom, with its ancient precedency, to Earl Ludovick, and the heirs male of his body, remainder to John Earl of Lindsay and the heirs male of * his body, remainder *to the heirs male whom- * 569 soever of the said Ludovick, &c.* It is important to notice the last remainder, as it is under it the claimant makes his title to the Earldom, although he might, if this patent never existed, make out his claim as the heir male of the original grantee. It appears from the evidence that, after the death of Earl Ludovick without issue, his successor, the said John Earl of Crawford and Lindsay, sat in Parliament with the ancient precedence of the Earls of Crawford. Having afterwards changed sides, and joined the Parliament, he obtained, in 1648, when King Charles I. was prisoner in Carisbrook Castle, from the Barons of the Exchequer in Scotland, another patent, limiting these honours, on failure of heirs male of his body, to the heirs female of his body, thereby introducing a limitation unknown in the ancient descent of the Earldom of Crawford, and not contained in the patent of 1642. The patent of 1648 was inoperative, being without the king's sign manual, though it was granted in his name, and accordingly Colonel Campbell, descended from an heir female of this seventeenth Earl, after having taken certain proceedings,³ in order to establish his title to the honours and estates under the new limitation, was advised ultimately to abandon his claim as hopeless. The descent, therefore, of the Crawford Peerage is to be governed by the patent of 1642, limiting it to heirs male, and therefore after descending from the seventeenth Earl to his eldest son, and from time to time lineally to the nineteenth and twentieth Earls, it passed, upon the death of the latter without issue, not to his sister, who was his heir at law, but to George, fourth Viscount Garnock, the nearest * collateral male heir, who was descended in the * 570

¹ English and Irish Peerages cannot be lost, except by attainder or *express* words in an Act of Parliament. See *The Earl of Waterford's Case*, 6 Clark & Finnelly, 133.

² Ante, p. 552.

³ See 2 Shaw & Dunlop, 737 ; and 2 Wilson & Shaw, 440.

fourth degree from Patrick Lindsay, of Kilburnie, second son of the seventeenth Earl. This George, twenty-first Earl of Crawford, was succeeded by his son George, the twenty-second and last Earl, who died in 1808, without issue, leaving a sister, Lady Mary Lindsay, who died in 1833. She enjoyed the Crawford estates from her brother's death, under a recent entail, under which it passed, on her death, to the Earl of Glasgow, but the Peerage has been dormant since 1808.

The noble claimant was not aware of the patent of 1642 until 1834, when Lady Mary Lindsay's executors, finding it in her muniment chest among the titles to the estates, communicated it to him ; and thus the non-claim since 1808 is accounted for. Lapse of time, however, is no bar to a claim of Peerage ; a much longer lapse occurred in *The Devon Case*,¹ and in several others, which have been since before the House.² The discovery of the patent in 1834 led forthwith to an investigation and to an accumulation of a mass of evidence which will remain to all time a monument of the industry and intelligence of the very learned counsel (Mr. John Riddell) who directed and arranged it, and was thereby the means of elucidating this long and illustrious descent.

Mr. Wortley then proceeded to point out the instruments evidencing the extinctions of the several branches of the Lindsays, prior in right to the claimant ; first, the Garnock and Kilburnie branches of the Byres line, and that line also ; then the
 * 571 Spynie branch of the elder * line of the Lindsays, showing that the proximate right of succession to both dignities, after Ludovick, was in the representative of that line, if the Earldom had not been carried by the patent of 1642 to the Byres family. And, finally, after detailing the evidence, both parol and documentary, of the extinction of the elder branch of the Lindsays of Edzell, by the death of the last male representative in 1744, he deduced the pedigree of the claimant from John Lindsay of Balcarras, sprung from the Edzell branch, concluding that he was not only the lineal descendant and heir male of the first Earl of Crawford, but also the "heir male whomsoever" of Ludovick, the sixteenth Earl, under the patent of 1642.

The Barony of Lindsay did not pass under that patent ; it

¹ Sir H. Nicolas's Rep. ; 2 Dow & Clark, 200 ; 5 Bligh N. S. 220.

² The Camoys, The Braye, and The Beaumont Peerages, 6 Clark & Finnelly ; and The Hastings Peerage, 8 Clark & Finnelly, 144.

remained dormant, ever since Earl Ludovick's death, in the heirs male of the third Earl and first Lord Lindsay; and the claimant, being now proved to be the lineal descendant and direct heir male of his second son, the mail representatives of the first son being shown to be long since extinct, is clearly entitled to the Barony as well as to the Earldom.

With respect to the claim of Robert Lindsay Crawford, which has been noticed in the course of the evidence, and shown to be unfounded, it must be so considered by the Committee, as he has virtually abandoned it, having taken no step beyond the presenting of a petition to the Crown.¹

THE LORD ADVOCATE objected to the evidence as defective in four points. First, as to the title of Lord Lindsay, — which was claimed as a substantial Peerage, — * there was no charter * 572 or patent of its creation, no more than of the Earldom of Crawford. There was however, he admitted, sufficient proof of the creation of the Earldom in 1398, in the *compotum* and other documents of that date. There was no proof at all of the creation of the minor title, nor of its existence anterior to Alexander, the fourth Earl, except by one instrument, dated in 1466, in which David, the third Earl, is also called "Lord Lindsay." That his son Alexander, fourth Earl, was also Lord Lindsay is sufficiently proved by an instrument dated in July, 1451, in which he is styled "*Comiti de Crawfordrie et Domino de le Lindessay*"; and that his successors, down to, and including, Earl Ludovick, enjoyed the minor title also, is not disputed. The question then is, Who was the first Lord Lindsay? The claimant suggests the probability that that title was anterior to the Earldom, and insists that David, the third Earl, bore it, because he is called, Earl of Crawford Lord Lindsay, by his grandson, the fifth Earl, in a charter of confirmation, dated in 1466. In several other deeds he is called Earl of Crawford only, while his son Alexander, and grandson David, fifth Earl, are there named by both titles.

LORD LYNTHURST. — There is in one deed a positive assertion of the title, the others are merely silent.

LORD BROUGHAM. — May not the omission of the second title be owing to the discretion of the professional man who drew the deeds? Is it usual on all occasions to mention all the titles of a peer?

¹ Vide ante, p. 534.

THE LORD ADVOCATE. — The mention of the second title in a single deed, made long after the death of Earl David, appeared to be but slender evidence of the existence of it in him. If *573 that title existed first in Alexander, *fourth Earl, the claimant, who is not descended from Alexander, but from his brother, a younger son of David, does not make out his claim to the Barony, unless he can show that it was an honour descendible to heirs male general.

With respect to the Earldom of Crawford, — of the existence and destination of which there is no doubt, — the claimant puts his right to it on two grounds: first, as being lineally descended from the first Earl, who died in 1406; and secondly, he claims it by virtue of the ultimate limitation in the patent of 1642, as the nearest heir male of Ludovick, the sixteenth Earl. It will conduce to clearness if those two claims be reduced to one, and they do resolve themselves into one, for there is no question that the patent of 1642 is the regulating patent. To establish the claimant's right under that patent, he must show that all the male representatives of the Byres line, entitled under the prior limitation, are extinct. The descendants of the seventeenth Earl, the first Earl of that line, formed the two branches of Garnock and Kilburnie. The evidence of the extinction of the male heirs in these branches was not satisfactory.

The claimant is further bound to extinguish the male heirs in the main line from Alexander, the seventh Earl of Crawford, especially the Spynie branch, and after that he has to prove the extinction of the male heirs in the main Edzell line, before the Balcarras branch of that line can be admitted. The pedigree of the claimant in this branch is clear enough.

There is one part of the case of greater curiosity than importance, about the transfer of the honours from David, the eighth Earl, to David of Edzell, the ninth Earl, and the return of *574 them from him to David, son *of the "Wicked Master."

It is said that he pleaded guilty of an attempt to murder his father. Although that is a capital crime, there is no authority for holding that it involved what the legislature of Scotland made the special crime of parricide, — forfeiture of the estates and honours. Craig, to whose book reference is made, is not sufficient authority. The probability is, that all parties desired to get the "Wicked Master" out of the succession, and that there was some arrange-

ment, — to which the Crown must have been a party, — by which David of Edzell, a near relation, took the estates and honours, and after five years, restored them to David, the tenth Earl, from whom they descended in the ordinary course.

With regard to the resignation and regrant of the Earldom in 1642, there is no question that by the law of Scotland, it was quite competent for the tenant of an honour to resign it into the hands of the Crown in favour of another party; and if the Crown chose to accept that resignation, and regrant the honour to that party, such resignation did not extinguish the honour, but merely altered the course of descent, substituting new heirs, who took their place in Parliament in the precedence of the former holders of the honour. There were cases of such resignations and regrants; and in one case, in which a resignation was made before the Union, and the regrant was made after the Union in the terms of the resignation, it was held that the Crown was prevented, by a clause in the articles of Union, from acting upon the resignation, as it could have acted previous to the Union. There is no doubt that Earl Ludovick was completely in *titulo* to resign this honour in 1642; and that the Crown accepted the resignation, and regranted the honours, as it legally might, by
 * charter in favour of those heirs in whose favour the resignation was made. *575
 That charter from that time regulated the descent of the Earldom, without any regard to its destination or descent previous to the year 1642.

1848. May 16.

Sir F. Kelly said, that, in deference to the opinion of the Lord Advocate, and to the doubts and difficulties suggested by him at the last meeting of the Committee, and apparently acquiesced in by their Lordships, the claimant's counsel and agents had since made every practicable effort to remove all objections, and the further evidence which had been collected would, it was submitted, satisfactorily and conclusively establish the claim. Having stated in detail the nature of the supplementary evidence thus collected, for extinguishing the male descendants in the several branches mentioned by the Lord Advocate, he said, with respect to the existence of the Barony of Lindsay in David, the third Earl of Crawford, that he considered the fact to have been made out to the satisfac-

tion of the Committee by the deed of confirmation, in which he is named by both those titles —

THE LORD ADVOCATE. — The difficulty was that the widow of that David, in the deed of mortification which is recited in the confirmation, called him Earl of Crawford only, while she called her son, the fourth Earl, “Earl of Crawford and Lord Lindsay.”

Sir F. Kelly said, he was prepared to put the matter beyond doubt, by the production of another document, in which David calls himself by both those titles.

The supplementary evidence of extinctions before referred to having been given, the last-mentioned document was then produced from the charter chest of Lord Forbes of Castle Forbes, —

*576 it was dated in 1443, and purported * to be a mandate from David Earl of Crawford (third Earl), and “Lorde de Lindissay,” as principal sheriff of Aberdeenshire, to Sir Alexander Forbes, “our depute,” &c. The document was held to have been produced from the proper custody, and was admitted.

THE LORD ADVOCATE, at a subsequent sitting of the Committee, said the last document produced in proof of the Barony of Lindsay being in David, the third Earl, from whom the claimant traced his descent, completed the evidence on that point, to his entire satisfaction. He was also satisfied with the supplementary proofs given of the extinctions in the Byres branch. But with respect to the Spynie and Edzell branches, the doubts which he entertained on a former day were still unremoved.

After a discussion between the counsel on both sides, and observations thereon by Lord Lyndhurst, Lord Brougham, the Earl of Devon, and Lord Campbell, to the effect that as it was admitted, on the claimant's side, that he had further evidence relating to these branches in his power, it might be difficult for the Committee to come to a decision in his favour without production of that evidence.

Sir F. Kelly said, that, although he felt the most perfect confidence in the completeness of the claimant's case as it then stood, upon every point, he and his learned friends who were with him could not be insensible to the importance of the slightest suggestion from their Lordships, or from the Lord Advocate. He was himself of opinion that no additional light could be thrown on the case, that it could not be either weakened or strengthened by the

result of further inquiries ; still, as enough of the session yet remained to admit of further inquiry, and of a decision of the Committee before * its close, he would, if their Lord- * 577 ships would grant the opportunity, by an adjournment to not a distant day, direct further inquiries on those two points to which the Lord Advocate directed attention.

LORD LYN DHURST. — The case is now so simplified, that we should easily be able to dispose of it before the end of the session. The Byres branch of the case appears to me to be clearly made out.

THE LORD ADVOCATE reminded the Committee that the pedigree was long and intricate, and therefore encumbered with many difficulties, which imposed on him the necessity of carefully watching the proofs, but, in all the steps he had taken, he did not exceed what his duty required.

Sir F. Kelly. — Certainly. He now understood that no further evidence was necessary, except touching the extinction of the Spynie branch.

THE LORD ADVOCATE would not say a word of the necessity of the evidence, but he still held his objection with respect to the Spynie branch, unless evidence be brought to remove it. Nor was he satisfied that the Edzell branch was extinguished.

Sir F. Kelly. — Upon that branch all the evidence that was possible had been given, and on that the case must stand.

1848. July 18.

At a subsequent sitting of the Committee, further evidence of the extinction of male heirs of the last Lord Spynie, and of the Edzell branch also, having been given, the Lord Advocate said he was perfectly satisfied that the extinction of all the lines was proved, and that the claimant had established his pedigree.

August 11.

LORD LYN DHURST. — My Lords, this case has now occupied, I think, in the progress of the evidence, a period of about four * years. I have observed, and watched very carefully, * 578 the evidence as the parts of it have been successively laid before your Lordships. I have read the evidence from time to time ; and I have made objections upon different points as the

evidence proceeded, which objections have been successively cleared up. I am now in a condition to say, that so far as I am concerned, I am satisfied that the pedigree has been established. Under these circumstances, I shall move your Lordships to report in favour of the claimant.

THE LORD CHANCELLOR. — I have little to add to what my noble and learned friend has stated. I have paid every attention to this case: it is very long and very complicated; and it has required very considerable attention to be paid to it; and the result of that consideration of it is, that I concur entirely in the opinion that my noble and learned friend has expressed.

It was then “resolved that it is the opinion of the Committee that James, Earl of Balcarras, had made out his claim to the honours and dignities of Earl of Crawford and Lord Lindsay,” which resolution was reported to the House, and affirmed.

1847. May 11, 14. 1849. July 6, 26.

DANIEL BECKHAM, *Plaintiff in error.*

WILLIAM WALKER DRAKE and JOHN SURGEY, *Defendants in error.*

A. entered into an agreement with B. and C. to serve them for seven years, at fixed wages, at the rate of three guineas weekly, “the party making default to pay to the other the sum of 500*l.* by way or in nature of specific damages.” A. was dismissed; he became bankrupt, and after the bankruptcy brought an action of assumpsit on the agreement, to which the defendants pleaded his bankruptcy: —

Held, that this plea was an answer to the action, for that the right of action in respect of this breach of the agreement passed to his assignees.

THIS was a writ of error upon a judgment of the Court of Exchequer Chamber reversing a judgment of the Court of Exchequer of Pleas, in an action on promises. The action was brought by Beckham against Drake, Surgey, and Knight, upon an agreement dated 23d October, 1834, made between William Moxey Knight and John Surgey, of Bishop’s Court, Old Bailey, in the city of London, typesfounders, of the one part, and Daniel Beckham of

the other part. The agreement recited that Beckham had been for some time in the employment of Knight and Surgey, as their foreman in the carrying on of their trade, and that the said parties were mutually desirous of continuing their connection together for the term of seven years from the date of the agreement. The parties then agreed that Beckham should serve Knight and Surgey, and the survivor of them, for and during the term of seven * years, to commence and be computed from the * 580 day of the date of the agreement, as their foreman, and should, to the best of his power, promote and advance their success and prosperity in the same. And also, that he should not, during the said seven years, engage in the same or any other business, either on his own account or on account of or for the benefit of any other person, without their consent in writing, first had and obtained for that purpose. Knight and Surgey, for the considerations aforesaid, agreed, that they, or the survivor of them, would employ Beckham as their foreman during the said seven years, if they, or either of them should so long live, paying him wages after the rate of three pounds and three shillings of lawful money weekly. And it was mutually agreed and declared by the parties thereto, "that in case either of the said parties hereto, shall not well and truly observe, &c. the covenants, &c. herein on their respective parts contained, that then, and in such case, the party so failing or making default shall and will pay to the other of them the sum of five hundred pounds, by way or in the nature of specific damages."

The declaration contained two counts: the first count was special upon the agreement; the second count was upon an account stated.

Drake and Surgey severally pleaded, first, "non-assumpsit"; and secondly, that Beckham became bankrupt after the accruing of the causes of action and before the commencement of the suit, whereby the causes of action became vested in his assignees. Knight suffered judgment by default. Beckham joined issue upon the pleas of "non-assumpsit," and demurred to the pleas of bankruptcy. Drake and Surgey joined in demurrer. The issue in fact was * tried and a verdict was given for the plaintiff, * 581 damages 100^l.¹

The demurrers were argued before the Judges of the Court of

¹ 9 Meeson & Welsby, 79.

Exchequer, who, at the sittings after Trinity Term, 1841, gave judgment for the plaintiff upon the demurrer to the pleas of bankruptcy.¹ The defendants brought a writ of error in the Exchequer Chamber, and, after argument, the judgment of the Court of Exchequer was reversed² by the unanimous judgment of the Court of Exchequer Chamber.³

The present writ of error was then brought.

*582 **Mr. Martin* and *Mr. Stammers* for the plaintiff in error:—

The sole question which it is now intended to argue (for that arising out of the form of the contract to which two only of the defendants were originally parties, will not, after the unanimous decisions of two Courts, be further contested) is, whether the plea of the bankruptcy of the plaintiff affords a sufficient reason for depriving him of his right of action in this case. That will depend on the construction to be given to the 12th and 63d

*583 sections of the 6 Geo. IV. c. 16.⁴ *Applying to those

¹ 8 Meeson & Welsby, 846.

² 11 Meeson & Welsby, 315.

³ This case was likewise before the Court of Common Pleas in 1837. In June, Beckham became bankrupt, but obtained his certificate before November. Early in Michaelmas Term a rule for security for costs was obtained. After argument by Mr. Stammers for the plaintiff, and by Mr. E. V. Williams for the defendant, the rule was discharged. 4 Bingham N. C. 74. In giving judgment Lord Chief Justice Tindal said: "The plaintiff commences an action when he is a solvent person: he afterwards becomes bankrupt and obtains his certificate: it is not till after he has obtained it that application is made for security for costs, and there is no proof that the assignees undertake to go on with the action, but the affidavit in support of the application discloses the contrary." The defendant Drake, who was sued as a dormant partner, pleaded specially that the agreement on which the action was brought was made by the plaintiff with Knight and Surgey alone. There was a demurrer to this plea. The demurrer was argued in Hilary Term, 1838, and judgment given for the defendant, and that judgment was afterwards affirmed. See 4 Bingham N. C. 243; 1 Scott N. R. 675; and 1 Manning & Granger, 738 in Error. But see 9 Meeson & Welsby, 79, where the decision of the Court of Common Pleas is controverted, and the affirmance of it is explained.

⁴ 6 Geo. IV. c. 16, § 12, enacts, "That the Lord Chancellor shall have power, upon petition made to him in writing against any trader having committed any act of bankruptcy to appoint such persons as to him shall seem fit, who shall have full power and authority to take such order and direction, with the body of such bankrupt, as also with all his lands, tenements, and hereditaments, &c., as well copy or customary-hold as freehold, which he shall have in his own right before he became bankrupt, as also with all such interest in any such lands, tene-

sections the ordinary rules of construction, nothing but the personal estate of the bankrupt, and such contracts as directly relate to property, can be said to fall within them. Contracts which relate, not to the property but merely to the personal services of the bankrupt will not pass, and, as a necessary result, the right of action for a breach of any such contract will not pass; for there can be no difference between the contract itself and the right to sue for a breach of it. It must be admitted that in some of the cases the language of the Courts has been sufficiently equivocal to raise some doubts as to the construction of these clauses of the Bankrupt Act. But with respect to real property the question has been settled; *Smith v. Coffin*¹ decided that a real action passed to the assignees by the usual words of a deed of assignment in bankruptcy. But for an injury done to real property in the tenancy of the bankrupt the right of action would not pass, nor would the ordinary right to maintain trespass *quare clausum fregit* pass to the assignees; *Clark v. Calvert*,² *Rogers v. Spence*.³ The case of *Hancock v. Caffyn*,⁴ which was an action for damages for an improper distress levied by the bankrupt, *supports this argument, for the right of the assignees *584

ments, and hereditaments as such bankrupt may lawfully depart withal, and with all his money, fees, offices, annuities, goods, chattels, wares, merchandise, and debts, wheresoever they may be found or known, and to make sale thereof in manner hereinafter mentioned, or otherwise order the same for satisfaction and payment of the creditors of the said bankrupt.

The 63d section enacts, "that the commissioners shall assign to the assignees for the benefit of the creditors of the bankrupt, all the present and future personal estate of such bankrupt wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised, or bequeathed, or come to him, before he shall have obtained his certificate, and the commissioners shall also assign as aforesaid all debts due or to be due to the bankrupt wheresoever the same may be found or known, and such assignment shall vest the property, right, and interest in such debts in such assignees, as fully as if the assurance whereby they are secured, had been made to such assignees; and after such assignment neither the bankrupt nor any person claiming through or under him shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the city of London, or otherwise, but such assignees shall have like remedy to recover the same in their own names, as the bankrupt himself might have had if he had not been adjudged bankrupt.

¹ 2 H. Blackstone, 444.

² 12 Clark & Finnelly, 700.

³ 3 Moore, 96; 8 Taunton, 742.

⁴ 8 Bingham, 358.

to maintain such an action appears there to be confined to cases where the property of the bankrupt is injured. In *Wright v. Fairfield*¹ the question was whether an action for breach of contract for non-delivery of stone passed to the assignees, and the Court held that it did. There again the subject matter was a contract in relation to property, and the opinions of the Judges there were directed to personal property only. But it is clear that any contract which involves the exercise of the personal skill of the bankrupt himself, as the consideration for any promise made to him by a defendant would not pass. The contract here related to the personal labour and skill of the bankrupt, to which the assignees could by no possibility have any title whatever. The assignees cannot enforce a contract for the performance of work which depends on the bankrupt's skill and labour, though they might be entitled to the sum received on account of that contract if the work had been actually performed and the money paid. Thus, if an artist was under a contract to execute a painting, and he became bankrupt, the assignees would neither have the right nor the power to compel him to perform that work, though if it had been performed, and he had been paid for it, and the money was in his possession at the time of his bankruptcy, it would form part of his assets. *Gibson v. Carruthers*,² where the law was most fully considered, clearly establishes this distinction. There Lord Abinger, who differed from the other Judges in the Exchequer, put this case of a contract for the personal labour of the bankrupt, and illustrated it by the case of Sir Walter Scott and his contract to write works of fiction, asking³ whether, supposing Sir Walter Scott had become bankrupt, "the solvent booksellers would have been content to pay their 4000*l.*, and take the risk of publishing a novel written by the assignees of the novelist." The present contract is of the same character as that referred to in Lord Abinger's judgment. The performance of it depends on the personal skill and ability of the bankrupt. If he had not been previously dismissed from the service, his bankruptcy would not have affected the performance of his labour, nor would it have released them from their contract. He would have been entitled to his salary for the week after the assignment; *Williams v. Chambers*.⁴

¹ 2 Barnewell & Adolphus, 727.

² 8 Meeson & Welsby, 321.

³ 8 Meeson & Welsby, at p. 344.

⁴ 10 Queen's Bench, 337.

There are many rights of action which do not pass to administrators or to assignees of a bankrupt. The seduction of a servant is one instance of the kind; *Howard v. Crowther*.¹ Actions for assault and for slander, (except, perhaps, slander affecting only the trade of the bankrupt and directly diminishing the profits of his trade,) trespass to the person, negligence in the cure of bodily infirmity or wounds, and for not safely carrying, are other instances of the same kind. But without mentioning these, the last two of which, though founded in contract, partake in their nature of torts, there is one which is distinctly in the class of contracts, namely, an action for breach of a promise to marry. Such an action is clearly personal alone. It is true that an administrator did once attempt to maintain such an action, *Chamberlain v. Williamson*,² but failed. That case is a strong authority for the plaintiff in error here, for if an administrator cannot maintain an

* action in respect of the breach of a purely personal con- * 586
tract with the intestate, though his estate might be benefited by its performance, most certainly assignees cannot do so in respect of a purely personal contract with the bankrupt, for an administrator is more directly and absolutely the representative of the person of his intestate than assignees are of the bankrupt. Yet the argument which will, no doubt, be much relied upon by the other side, exists in such a case, namely, that to maintain the action might be for the benefit of the estate, so that the exception now mentioned proves that the law does not always look to the indirect consequences by which the estate of the bankrupt may be increased. In one case, where 570*l.* were ultimately recovered in an action for not safely carrying by a railway, there was no pretence that the right of action passed to the assignees, and yet the estate of a bankrupt would have been largely benefited by such damages. The benefit to the estate therefore is not the only matter to which the law looks, but rather to the principle whether the right is, or is not, founded in something of a purely personal kind. The true rule is this, that if the contract goes directly to the increase of the personal estate, as in *Wright v. Fairfield*,³ then the right of action on it will pass; and, again, if the breach of such a contract occurs before the bankruptcy, the right of action for that particular breach will pass. But if the contract is for labour to be

¹ 8 Meeson & Welsby, 601.² 2 Barnewall & Adolphus, 727.³ 2 Maule & Selwyn, 408.

performed, involving the exercise of the contractor's own personal skill, except so far as a debt has been created by the exercise of that personal skill before the bankruptcy, that will not pass. The damage here is likewise purely personal, the injury being to the bankrupt himself in the loss of the means of subsistence to * 587 which he is entitled, and in * the loss of time in looking after other employment. The cases of *Chipenpdall v. Tomlinson*,¹ where Lord Mansfield says "the assignees cannot let out the bankrupt"; *Silk v. Osborn*,² and of *Hesse v. Stevenson*,³ — in the last of which it was expressly said that the assignees cannot take the profits of the bankrupt's daily labour, — clearly establish the principle of this distinction; and in *Williams v. Chambers*,⁴ it is distinctly affirmed by the Court that there is "no authority in which it has been held that the assignee of a bankrupt or insolvent could sue for the price of the personal labour of the bankrupt or insolvent after the bankruptcy or insolvency, as a debt due directly to the assignee himself as upon a contract made with him." The same rule was likewise established in *Ex parte Walters*,⁵ where it was held that a man was not liable to account to his assignees for money received by him as a surveyor for valuing, such money being received in respect of his personal labour.

The argument that the assignees would be entitled to the money if it was in the bankrupt's actual possession, that this admits a right of action in them, and that two rights of action vested in different persons cannot exist in respect of the same matter, is not always and necessarily correct. Two rights of action may exist together, even though in one of them no more than nominal damages might be recovered. In *Williams v. Millington*,⁶ Lord Loughborough declares the possibility of two actions for the same cause, and says: "It is not a true position that two persons cannot bring separate actions for the same cause. The carrier * 588 * and the owner of the goods may each bring an action on a tort; the factor and owner may each have an action on a contract." This declaration is founded on very ancient authority. In Bracton⁷ it is said, *Ex uno facto injurioso plures possunt oriri actiones pœnales in causâ civili*. An instance of this occurred in

¹ 4 Douglas, 318; Cooke's Bankrupt Laws, 260, 431.

² 1 Espinasse N. P. C. 140.

³ 2 Montagu, Deacon & De Gex, 635.

⁴ 3 Bosanquet & Puller, 565, 578.

⁵ 1 H. Blackstone, 81, 85.

⁶ 10 Queen's Bench, 337, 345.

⁷ Book III. fol. 114.

the case of *Turner v. Ford*,¹ where a piano in the hands of a bailee was seized for rent due from him, and where Baron Parke said:² “I am inclined to think that if the act of conversion had amounted to pound breach, the defendant would have been liable in damages to the landlord, and also to the owner of the property for damages for the conversion.”

[LORD CAMPBELL. — That was a case of two actions in respect of separate rights. But I want the case of two actions by different parties in respect of the same right. The bankrupt and assignees sue in respect of the same right.]

Such a case is unknown in practice, but the principle which governs one case governs the other; and in the judgment delivered by a noble and learned Lord in this House in the case of *Rogers v. Spence*, it was said:³ “It may possibly be that the law will give an action to the bankrupt for the personal injury which has been sustained by him, and will give an action to the assignees for the injury which has been done to the property; as for example, in the case which has been put during the argument, of the owner of a ship being on board, and the ship being run down on the high seas, and the ship going to the bottom and the owner escaping and afterwards becoming bankrupt; it is possible that he may maintain an action for the personal injury done to him, and that the assignees may maintain an action for * the injury done to the * 589 property.” Here the principle exists on which the right to bring these two actions is founded. It is the principle of a distinct right being vested in the bankrupt in virtue of a purely personal matter. The existence of such a right shows the judgment of the Court below to be erroneous.

Mr. Peacock and *Mr. Hugh Hill* (*Mr. W. Morris* was with them) for the defendants in error: —

It is impossible to contend that the assignees take no interest in the profits of the bankrupt's labour, and if they do take an interest in them, they can sue to recover these profits. They are certainly entitled to that which adds to the value of his estate. The defendant here broke his contract with the bankrupt. Had he paid the bankrupt the money, that money would have been assets in the bankrupt's hands for the benefit of the creditors. The damages that arise from the breach of the contract also belong

¹ 15 Meeson & Welsby, 12.

² 12 Clark & Finnelly, at p. 720.

³ 15 Meeson & Welsby, at p. 215.

to them. Suppose the bankrupt had served for six years at a thousand a year, but had not received the money, and at the end of the next half-year had become bankrupt, there can be no doubt that the assignees would be entitled to recover all the money then due, as well the money for the last half-year as for the six preceding years. Their right to recover it in respect of a wrongful dismissal must be the same as in the case of the services being actually performed but not paid for. The case of *Chippendall v. Tomlinson*¹ does not disprove this proposition, for it merely establishes that under such circumstances the bankrupt may sue, his assignees not interfering. The expression attributed to Lord Mans-

field in the abstract given of this case in Cooke's Bankrupt
* 590 Laws,² * that "the assignees cannot let out the bankrupt,"

means no more than that they cannot contract for his future labour, a doctrine that no one presumes to doubt; but if he has already, and before his bankruptcy, made a contract for that labour, they are entitled to recover for a breach of that contract by which the amount of his assets is diminished.

The question whether more than nominal damages could be recovered in the action, as in cases where the bankrupt personally and the bankrupt's property suffer from the same act, does not in the least degree affect this case, for, if so, this absurdity would follow, that, in order to ascertain the right to maintain the action itself, there must be a verdict given, that is, a verdict ascertaining and fixing in respect of what cause of action it was pronounced, and that not till then could the right to maintain the action be decided. The law cannot allow such an absurdity.

[LORD CAMPBELL. — By the law of Scotland the damages would be divided: so much would be given for the injury to the property, and so much for the injury to the person.]

No such distinction is made by the law of this country. If a man sues for a debt, he cannot join in that action any claim for damages for injury to his feelings through having been kept out of it. In the case of *Startup v. Cortazzi*,³ the rule as to the time at which the damages arise on a breach of contract is ascertained, and that rule shows that nothing of feeling can enter into consideration in such a case. That was an action for not delivering linseed at a given time. A portion of the price of the linseed had

¹ 4 Douglas, 318.

² 2 Crompton, Meeson & Roscoe, 165.

³ 1st ed. 260.

been advanced, and it was held that repayment of the money advanced, with simple interest * upon it, and pay- * 591 ment of the difference between the contract price of the seed, and the price at the time when it ought to have been delivered, would be the right measure of damages. It was the loss of profit at the time of the breach that the plaintiff there was held entitled to ; and in this case, he was no more entitled to vindictive damages for dismissal from employment, than in that, for any injury to his feelings by the non-delivery of the seed. This subject was fully discussed in *Brewer v. Dew*,¹ which is a very strong case on the side of the defendants in error. There the plaintiff brought an action of trespass for seizing and taking his goods under a false and unfounded claim of a debt. The allegation was that he was annoyed and prejudiced in his business, and believed by his customers to be insolvent, and certain lodgers left his house ; and it was held that the plaintiff alone might sue, because there the jury could give vindictive damages for the injury to the plaintiff's personal feelings. The power to give vindictive damages was the test applied by the Court. Apply that test here, and the right of the bankrupt to maintain this action fails entirely, for here the jury could not give vindictive damages, and consequently the right to maintain the action is one which exists for no other purpose than the increase of the funds of the estate, and therefore passes to the assignees. That principle was adopted in this House in determining the case of *Rogers v. Spence*.² It is upon such a principle that a right of action for an injury to a man by being run over, by being assaulted, by a breach of promise to marry him, by criminal conversation with his wife, or by the seduction of his daughter, would not * pass to his assignees. In all these cases * 592 the damages are vindictive in their nature. No previous property existed in them before the wrong committed, and his estate might not have been the better if he had not been run over, or assaulted, or if the promise to marry him had been performed, or if his wife had remained faithful, or his daughter been unseparated. In all these instances the right to damages is in consequence of a purely personal wrong, and exists for the compensation of his bodily or mental feelings. For that reason alone the right of action does not pass to his assignees. But here, if the contract had been performed, the estate of the bankrupt would have been

¹ 11 Meeson & Welsby, 625.² 12 Clark & Fennelly, 700, 718.

thereby benefited, and the breach of it did not affect his feelings but his property. *Chamberlain v. Williamson*¹ is therefore inapplicable here. In *Gibson v. Carruthers*² it was held that the assignees were entitled to maintain the action for a breach of contract entered into with the bankrupt before his bankruptcy. The right to sue for unliquidated damages on a contract with the bankrupt undoubtedly passes to the assignees. *Porter v. Vorley*.³ And that being the rule, the party who sets up an exception to it must show that those damages are entirely given for the wounded feelings of the plaintiff, and are what have been called vindictive damages.

The fallacy in the argument on the other side lies in confounding this, which is an action of contract, with an action of tort. The rules applicable to the latter species of action have no application here. A contract for personal labour has been attempted to be distinguished from a contract relating to property, and has been confounded with an action arising out of matter * 593 * relating to personal feeling, yet no two things can be more different from each other. This fallacy has been attempted to be supported by reference to the cases of actions for injuries to real property, which, it has been said, will not pass to assignees, and *Clark v. Calvert*,⁴ and *Rogers v. Spence*,⁵ have been relied on to support this proposition. It is true that actions of trespass will not pass; but the general proposition that actions in respect of injuries to real property, while in the bankrupt's possession will not pass, is not true. Suppose the property was in a tenant for life, and a stranger took away the soil, so as to injure the interest of the tenant for life, the right of action for that would pass to his assignees. The rule of construction as to bankrupt statutes is to be found in the 21 Jac. I. c. 19, where it is said that such laws "shall be largely and beneficially construed for the aid, help, and relief of creditors." In *Ryall v. Rolle*,⁶ the same thing is declared, and it is determined that "goods" shall mean all choses in action. The bankrupt statutes have in this respect been put upon the same footing as statutes relating to the Crown.

• The exception to this rule has been where the bankrupt was

¹ 2 Maule & Selwyn, 408.

⁴ 8 Moore, 96; 8 Taunton, 742.

² 8 Meeson & Welsby, 321.

⁵ 12 Clark & Fennelly, 700.

³ 9 Bingham, 98.

⁶ 1 Atkyns, 365, nom. *Ryall v. Rowles*; 1 Ves. Sen. 348, 369, 371.

entitled to sue for damages for an injury to his person, or his personal feeling. No such cause of action exists here — the only cause of action is one which relates to the diminution of his personal estate; and though his personal labour may be mixed up with that, still the right of action passes to his assignees, *Crofton v. Poole*.¹ That case is directly in point, and it is well warranted by all the authorities. The judgment * of the * 594 Court below is in accordance with those authorities, and is therefore correct.

Mr. Martin in reply: The contract here is one of a peculiar nature. It is a contract to serve, not to furnish or to produce an article of commerce, and consequently it has nothing in it of the nature of a contract to sell goods: it is not a mixed contract of work and materials; it is one of a purely personal nature. The distinction between the two classes of cases is strongly taken in *Crofton v. Poole*,² which, in truth, is a strong authority for the plaintiff in error. It is also taken by the bankrupt laws themselves, which subject to their operation, a man who works on certain commodities, and sells them, and in that way lives on the profits of his labours, but which do not subject to their operation the man who merely lives on the wages he receives for his labour.

There is no particular rule of construction as to the statutes on bankruptcy: they are not to be construed favourably or unfavourably to one class of persons or another, but, like other statutes, according to their plain and obvious meaning; *Benson v. Flower*.³

All the cases show that the contract to pass to the assignees must be a contract in respect of property, and not of labour, and here no property was affected, and there could be no injury to the personal estate. What the bankrupt received weekly, he would be entitled to for the maintenance of himself and his family, and that money would not go to form part of his general estate.

THE LORD CHANCELLOR said that he proposed to give the learned Judges the record in this case, and to ask * them * 595 whether, on that record, they thought the plaintiff in error or the defendants in error entitled to judgment.

This was agreed to, and Lord Chief Justice Wilde, in the name of the Judges, requested time to consider their answers.

¹ 1 Barnewall & Adolphus, 568.

² Sir W. Jones, 215.

³ 1 Barnewall & Adolphus, 568.

On the 6th of July, 1849, the Judges delivered their opinions: —

MR. JUSTICE V. WILLIAMS. — The question which in this case your Lordships have submitted for the consideration of the Judges is, whether the plea of bankruptcy is a good bar; which depends on the further question, whether the right of action on which the plaintiff below has declared did or did not pass to his assignees; and I have to give my opinion to your Lordships that it did pass, and consequently that the plea is good.

The case plainly depends on the construction of the Bankrupt Act, 6 Geo. IV. c. 16, §§ 12 and 63. The sixty-third section confers on the assignees “all the present and future personal estate” of the bankrupt; and the question appears to me to be whether this right of action passed to them as part of his “personal estate.” It may be observed that the same section proceeds to confer on them “all debts due or to be due” to the bankrupt; and at one time it seems to have been doubted whether this did not narrow the construction of the expression “personal estate”; but this doubt appears to be set at rest by the decisions of the cases of *Wright v. Fairfield*;¹ *Hancock v. Caffyn*;² and *Porter v. Vorley*.³

The right of action on which the plaintiff below has de-
* 596 clared is founded on a breach of contract incurred * before the time of the bankruptcy, and consequently it can hardly be disputed that at that time it formed a part of “the personal estate” of the bankrupt, in the ordinary acceptation of that expression. “The authorities,” said Lord Abinger, in delivering the judgment of the Barons of the Exchequer, in *Raymond v. Fitch*,⁴ “are uniform, that the personal representative may sue, not only for all debts due to the deceased by specialty or otherwise, but for all covenants, and indeed all contracts with the testator, *broken in his lifetime*; and the reason appears to be, that these are choses in action, and are parcel of the personal estate in respect of which the executor or administrator represents the person of the testator, and is in law the testator’s assignee.”

It has been said indeed, and truly said, that the rights of an executor are not so limited as those of an assignee of a bankrupt: for that the executor represents the deceased as to all his contracts

¹ 2 Barnewall & Adolphus, 727.

⁹ Bingham, 93.

⁸ Bingham, 358.

² Crompton, Meeson & Roscoe, 596.

and personal rights, whether they are available as assets for the payment of his debts or not; but an assignee takes only those beneficial matters belonging to the bankrupt's estate which may be applied for the purpose of distribution amongst his creditors. Inasmuch, however, as the right of action in question, if held to pass to the assignees, is plainly capable of being turned into profit for the benefit of the creditors, it seems to follow that the distinction above suggested ought to have no effect on the present inquiry, however material it might be, if the contest was that some portion of the bankrupt's personal estate did not pass to his assignees by reason of its not being distributable among his creditors, but, nevertheless, would *certainly vest in his * 597 executors, though it would not be assets in their hands, by reason of not being vendible, as in the instance of the next presentation to a vacant ecclesiastical benefice.

Assuming, however, the general rule to be, that a right of action in respect of a breach of contract already incurred at the time of the bankruptcy forms part of the personal estate of the bankrupt, and so passes to his assignees, it has been argued, on behalf of the appellant, that the present case must be regarded as an exception to that rule, inasmuch as the damage recoverable in respect of this breach of contract must be in part compounded of the personal inconvenience to the bankrupt himself caused by such breach, and that the case must therefore be governed by the principle which excludes both executors and assignees from suing in respect of breaches of contract where the damage consists of personal suffering. It certainly has been established by a series of authorities, ending with the case of *Rogers v. Spence* in this House,¹ that no action can be maintained, either by an executor or by an assignee, to recover damages for bodily or mental sufferings or personal inconvenience sustained by the deceased or by the bankrupt; the foundation of which is, perhaps, that it would in many cases be attended with extremely harsh and unjust consequences if the discretion, as to whether a redress for wrongs of this nature should be sought, was to be intrusted to any one but the very person who has received the injury.

But it does not appear to me that any damage would be recoverable in this action in respect of any personal suffering or

¹ 12 Clark & Finnely, 700.

* 598 personal inconvenience sustained by the * bankrupt. The declaration is evidently framed in order to enable the plaintiff to recover as liquidated damages the sum of 500*l.*, which the agreement stipulates shall be paid, in the way of specific damages, by either party who shall break the agreement, to the other; and although judgment has in fact been obtained for a smaller sum, and the 500*l.* have therefore in the result been regarded as a penalty, and not as liquidated damages, still, the declaration expresses no claim for damages in respect of any personal suffering or inconvenience caused to the plaintiff by the breach of the agreement declared on: and it may here be remarked, that if the Statute 8 & 9 Wm. III. cap. 11, § 8, had never been passed, the plaintiff would have been entitled, on proof of the breach of the agreement assigned in the declaration, to recover the whole 500*l.*, even though it be a penalty, and not liquidated damages; and that, notwithstanding that statute, if the action had been brought in debt, the plaintiff would still be entitled to have judgment entered for the whole 500*l.*, although he could only take out execution for such damages as the jury should assess on the breach assigned. If then the claim in respect of such a breach can thus be made the subject of an action of debt, it seems difficult to maintain that the assignees are not the proper parties to enforce such a claim.

But it has been further argued, that the right of action in question does not pass, because the contract does not relate to the personal estate of the bankrupt, but to his person, being for the employment of his personal skill and labour; and it cannot be doubted that where a contract remains to be executed, and cannot be executed without the co-operation of the bankrupt, his assignees

cannot enforce the contract, at all events unless they can
* 599 procure him to co-operate. But this * doctrine seems to have no application to a case like the present, where, at the time of the bankruptcy, the breach of contract had already occurred, and where, consequently, whether the action for damages in respect of that breach is brought by the bankrupt himself or by his assignees, he is not bound by the contract to bestow any of his skill or labour in order to sustain the right of action.

But it has been further objected, that damages are substituted for specific performance, and that where there can be no specific performance there can be no action for damages; and it has been

asserted, as a general proposition, that unless the contract itself, if unbroken, would have passed to the assignees, the right to sue for a breach of it cannot pass to them. But if these arguments are sound, they will apply equally to the instance of an executor. Now, it can hardly be contended that the right of action in question would not pass to the executor; and yet it is obvious that the executor could not specifically perform the contract, nor would the contract itself, if unbroken, pass to him. So in the case of a covenant real, that is, which runs with the land and descends to the heir, if it has been broken, and the substantial damage has taken place in the lifetime of the testator, his executor must sue upon it; but if no breach occurred until after the death of the testator, the right of action would be in the heir.

On the whole, then, I can discover no good reason why the words "personal estate of the bankrupt," in the sixty-third section of the Bankrupt Act, should not include the right of action in question; and it would, I conceive, be a violation of the general scheme and policy of the bankrupt law (not to be permitted without * some cogent cause) if the bankrupt should be * 600 allowed the power of depriving his creditors of the fruits of this right of action which was a right absolutely and completely vested in him before the time of his bankruptcy, and is capable of being turned into profit for their benefit.

My answer, therefore, to the question of your Lordships, is, that the defendant below is entitled to judgment.

Baron Platt.— In this action the plaintiff sought to recover damages for the defendants' breach of a contract into which they had entered to employ him for the term of seven years as foreman in a business requiring his personal skill and labour. That breach was committed by the defendants dismissing him altogether before the expiration of the term.

The defendant Drake, amongst other things, pleaded that after the cause of action had accrued, and before the commencement of the suit, a *fat* in bankruptcy had issued against the plaintiff, under which the plaintiff had been adjudged a bankrupt, and assignees of his estate and effects had been duly appointed, and, as such assignees, they became entitled to the cause of action and damages in the declaration mentioned.

To this plea the plaintiff demurred. The question therefore

raised by these pleadings is, whether the right of action against the defendants, which vested in the plaintiff before his bankruptcy, passed under the *fiat* to the assignees.

The assignees under a *fiat* in bankruptcy take "all the present and future personal estate of the bankrupt, and all the debts due to him." 6 Geo. IV. cap. 16, § 63. This description may * 601 well include, not only * personal chattels, and debts properly so called, but all rights of action having relation to those subjects, such as for abstracting, converting, or injuring personal chattels, or for such breaches of contract relative to the personal estate of the bankrupt as prevent that estate coming to the hands of the assignees, or depreciate its value, and all beneficial contracts of sale or purchase of goods and merchandise. *Hancock v. Caffyn*,¹ and *Gibson v. Carruthers*,² show the principle on which such contracts and rights of action have been held to pass.

But these injuries, contracts, and breaches of contracts respectively bear a direct relation to the moveable estate of the bankrupt, and differ wholly in that respect from injuries to the bankrupt's person or reputation, injuries to him in his character of father, master, or husband, or the breach of a promise to marry, or of a contract to cure him of a disease or heal a wound; in which cases, although the right of action may have vested before the bankruptcy, it would not pass to the assignees, because the cause of action relates immediately to the person, and not to the estate of the bankrupt.

Following this distinction, and applying it to the case awaiting the judgment of your Lordships, I should have thought it difficult to say that the breach of a contract to employ an individual during a definite time in a service requiring his personal skill and labour (committed by discharging him before the expiration of the stipulated period), did not primarily and immediately relate to the person of the servant.

* 602 In the judgment in the Court of Exchequer Chamber * it is stated, that in the present case, although the contract was for the personal skill and labour of the bankrupt, the breach of that contract did not appear to cause him any other injury than the diminution of his personal estate; and that in this case the injury to the person, if any, was a consequence of the injury to the

¹ 8 Bingham, 358.

² 8 Meeson & Welsby, 321.

personal estate. And from these premises the Court concludes that the injury to the personal estate was in this case the primary and substantial cause of action. But surely in point of law the breach of the contract by dismissal is the injury, and the loss it might occasion to the plaintiff is the consequence of that injury.

If the bankrupt had continued in the service, could the assignees have sold the benefit of the contract? Could they have performed it? They certainly could not, for the personal skill and labour of the bankrupt are so involved in the performance of his part of the contract as to render it impossible for them or their vendee to render the stipulated service, which alone would give value to that contract, unless the bankrupt himself, as well as his estate, had passed to his assignees under the *fiat*, and he had thereby become their slave.

If at the time of the bankruptcy the consideration had been executed, and the right of the bankrupt had been to recover remuneration for past services, or if he had recovered a judgment in an action brought to recover damages for the breach in respect of which he seeks to recover in the present action, the remuneration and judgment would have passed as debts to the assignees. But in this case, in which the consideration is not executed, and damages alone can be recovered, the mere vesting of a right of action in the bankrupt before the bankruptcy cannot be sufficient.

The subject to which that right primarily refers must * be * 603 taken into consideration. If it primarily refers to the personal estate alone, it would pass to the assignees. If it refers to the person of the bankrupt only, or to the person and estate jointly, I am of opinion it would not so pass.

The present action is brought upon a breach involving personal injury to the bankrupt, inseparably united with pecuniary loss resulting from that breach. I think the Court of Exchequer rightly decided that it related to the person; that for the refusal to employ the personal skill and labour of the bankrupt the damages would be compounded partly of the personal inconvenience to himself, and partly of the consequential loss to his personal estate, by reason of his not being able to earn so much in another employment; and that the plaintiff was entitled, notwithstanding his bankruptcy, to sue on the contract. My answer, therefore, to the question proposed by your Lordships, is, that the plaintiff in error is entitled to your Lordships' judgment.

Mr. Justice Erle. — This was an action on a contract for hiring and service, whereby the plaintiff was to serve for seven years, and the defendant to pay weekly wages during that time; and the breach was a dismissal during the seven years. The plaintiff, after this breach, and before the commencement of the action, became bankrupt; and the question is, whether this cause of action passed from the plaintiff to his assignees.

The general principle is, that all rights of the bankrupt which can be exercised beneficially for the creditors do so pass, and the right to recover damages may pass though they are unliquidated;

Wright v. Fairfield,¹ *Kearsey v. Carstairs*.²

*604 *This principle is subject to exception. The right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without immediate reference to his rights of property. Thus it has been laid down that the assignees cannot sue for breach of promise of marriage, for criminal conversation, seduction, defamation, battery, injury to the person by negligence, as by not carrying safely, not curing, not saving from imprisonment by process of law; also the right of action does not pass in respect of wages earned by the bankrupt upon a hiring after the bankruptcy, *Silk v. Osborn*; ³ also the right of action cannot be made to pass to the assignees in respect of contracts uncompleted at the time of bankruptcy, by their adoption and completion thereof, where the personal service of the bankrupt himself is of the essence of the contract. The authorities are collected in the report of *Beckham v. Drake*.⁴ The grounds that were there assigned for holding this case to be within the exception were, first, because the contract relates to the person, being for the employment of the personal skill and labour of the bankrupt; and, second, because the damage for a breach of it would be compounded partly of the personal inconvenience to the bankrupt, and partly of the consequential loss to his personal estate by reason of his not being able to earn so much in another employment.

Before stating my reasons for dissenting from these grounds, I would premise that one side of a contract being either consideration or promise, according as one of the parties is either

¹ 2 Barnewall & Adolphus, 727.

² 1 Espinasse N. P. C. 140.

³ 2 Barnewall & Adolphus, 716.

⁴ 8 Meeson & Welsby, 846.

plaintiff or defendant, when the * question is whether the * 605 assignees of a bankrupt contractor can sue for a breach of a promise broken before the bankruptcy, the nature of the promise is alone to be considered ; and when the question is whether the assignees have a right to adopt an unexecuted contract, and after the bankruptcy to complete the consideration for the purpose of enforcing the promise, the nature of the consideration is alone to be considered. Thus, in respect of promise, the assignees of a patient, if bankrupt, could not sue a surgeon for a breach of his promise to use due care in treating a wound, because the damages are assessed by reference to bodily annoyance ; but the assignees of the same surgeon, if bankrupt, might sue the patient on his promise to pay remuneration for attendance, because the promise relates to property ; and the assignees of a bankrupt could not sue on a breach of promise to marry, but the same assignees might, in my judgment, for the same reason, sue for a breach of promise to pay a given sum in case of refusing, on request, to complete a contract of marriage. Thus also, in respect of consideration, the assignees of a painter might not have a right to adopt an incomplete contract to paint a picture for a sum, and complete it, because the personal skill of the contractor would probably be of the essence of the contract ; but the assignees of the bankrupt purchaser, being ready with the money which was to be the consideration, might adopt the contract to pay, and sue the same painter, if he refuse to complete and deliver the picture according to his promise. As to the right of the assignees to adopt the contract where the duty of the bankrupt is to pay money only, see *Gibson v. Carruthers*.¹

* In the present case, then, the promise of the defendant * 606 is to be considered ; and the promise is, to continue the relation of master and servant for seven years, and pay wages. As to that part of it respecting the continuance of this relation, it has no reference to the feelings of the bankrupt, so as to be analogous to the promises and causes of action which are decided to be excepted, and it is not the substance of the promise which is considered in the award of damage ; but as to the other part, namely, the paying of the wages, it is the consideration for the promise of service. The substance of the promise, then, for the breach of which this action was brought, relates immediately to

¹ 8 Meeson & Welsby, 321.

the property of the bankrupt, being for the payment of money, and therefore the first ground above mentioned, namely, that the contract relates to the person, is true only in respect of the consideration for the promise, which is personal skill and labour, and not in respect of the promise itself, and which is alone important on the present occasion ; and for that reason the first ground fails.

It also appears to me that the other ground, viz. that the damage is compounded partly of the personal inconvenience to the bankrupt, and partly of the consequential loss to his estate, is in substance incorrect. The measure of damages for the breach of promise now in question is obtained by considering what is the usual rate of wages for the employment here contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place, and that the usual rate of wages for such employment can be proved, and that when a promise for continuing employment is

broken by the master, it is the duty of the servant to use
 *607 diligence *to find another employment ;¹ *Elderton v. Emmens*.² Upon these principles, in the present case, if the place of foreman in a type-foundry could not probably be again obtained without delay, and if the wages in the contract broken were higher than usual, the damages should be such as to indemnify for the loss of wages during that delay, and for the loss of the excess of the wages contracted for above the usual rate ; but no allowance would be made in the nature of *pretium affectionis*, nor any reference to any pain that might be felt by the bankrupt on the ground that he was attached to the place.

If the breach of promise had arisen because the defendants had retired from business, the action would have lain ; but if the defendants, in answer to the claim of damages, had proved that another person carried on the same business, and offered the plaintiff the same situation at the same or higher wages, the claim for more than nominal damages would, in my judgment, be at an end, and the plaintiff would not be allowed to prove that the change of employer was a source of regret personal to himself, and to obtain compensation for such regret.

¹ See the opinion of Mr. Justice Crampton in *Emmens v. Elderton*, 4 House of Lords Cases, at pp. 645, 646.

² 4 C. B. 498 note ; 6 C. B. 160 ; 17 Law Journal N. S. C. P. 307 ; [4 House of Lords Cases, 924.]

Indemnity for the loss of his bargain in respect of his labour would be settled on the same principle as for the loss of a bargain in respect of common merchandise. If goods are not delivered or accepted according to contract, time and trouble as well as expense may be required, either in getting other similar goods or finding another purchaser, and the damages ought to indemnify * both for such time, trouble, and expense, and for the * 608 difference between the market price and the price contracted for. Loss of time and trouble would be occasioned by a breach of contract in respect of goods, as well as by a breach of contract in respect of employment; but they are such time and trouble as have a known merchantable value, and the compensation is measured wholly regardless of the considerations which guide where bodily or mental pain is the direct object of contemplation.

Assuming then that the promise alone for the breach of which the action is brought is to be attended to in deciding whether the cause of action would pass to the assignees of a bankrupt or be within the exception, I have now submitted my reasons for dissenting from the grounds assigned for judging that it was within the exception.

If the consideration for such promise could also be legitimately considered in reference to such a question, it affords an additional reason for that dissent.

The skill and labour of an industrious man are in the nature of his stock in trade; they would in general be the source of a continuous profit, which could be foreseen, and might be prudently relied on as a ground for giving credit, and the creditors therefore have reason for saying that the benefit of all contracts relating to that source of value, on which they may have relied when they gave credit, ought to pass to them. At all events, the reason assigned in deciding some of the cases to be within the exception does not apply, namely, that the creditors cannot legitimately have looked to the pain of the bankrupt from a broken limb, or wounded affection, or blasted character, as a source of profit, they being in their nature casual and unforeseen, and unconnected * immediately with property. There is a manifest distinc- * 609 tion between damages from such sources as these last mentioned, and damages in respect of contracts for labour, which is the ordinary and constant lot of a large portion of society.

Upon the whole then, both because the promise for the breach

of which this action was brought appears to me to fall within the class of those relating to property rather than of those relating to the person, and because the measure of damages appears to me not to have immediate reference to the personal inconvenience of the bankrupt, that is to say, not to any pain to him in respect of his body, mind, or character ; and also, if the consideration for his promise is to be considered, because it appears to me in its nature to belong rather to the class relating to property than to the person, I think that the defendant is entitled to the judgment.

MR. JUSTICE CRESSWELL. — The answer to the question submitted by your Lordships to the Judges depends upon the effect which ought to be given to the twelfth and sixty-third sections of the Act 6 Geo. IV. cap. 16. The question is not affected by the subsequent Act 1 & 2 Wm. IV. c. 56, § 25.

In the earlier statutes, 34 & 35 Hen. VIII. c. 4, and 13 Eliz. c. 7, the words describing the interests to be dealt with by the commissioners are very similar to those found in the twelfth section of the 6th Geo. IV. c. 16. In the first section of the 1st James I. cap. 19, a direction is found, that all and singular the aforesaid statutes and laws heretofore made against bankrupts and for the relief of creditors shall be in all things largely and beneficially expounded for the aid, help, and relief of the creditors of such person or persons as already be or hereafter shall become bankrupt. And this direction is repeated in 6 Geo. IV. c. 16, § 135.

In *Smith v. Coffin*,¹ where it was held that the right to bring a real action passed to the assignees of a bankrupt, Mr. Justice Buller, alluding to this direction, says, "The Court is bound to construe the bankrupt laws in the most liberal and beneficial manner for the creditors. I therefore hold, that every species of right, of which by any possibility profit can be made, passes to the assignees." And Lord Chief Justice Eyre, in the same case, says, "The plain spirit of the bankrupt laws is, that every beneficial interest which the bankrupt has shall be disposed of for the benefit of his creditors."

Such being the spirit of the bankrupt laws, I apprehend that the words of the 6 Geo. IV. c. 16, are sufficiently comprehensive to give effect to it as far as the right to bring a personal action for

¹ 2 H. Blackstone, 444, 462.

breach of contract is concerned. In *Ford and Sheldon's Case*,¹ it was held (with reference to another statute) that "personal actions are as well included within the word 'goods' in an Act of Parliament as goods in possession." Lord Hardwicke quotes this case, in *Ryall v. Rolle*,² and then observes, "The aim of the legislature in all statutes concerning bankrupts, was, that the creditors should have an equal proportion of the bankrupt's effects, as far as possible, and it was intended that this Act (21 James I. c. 19) should be construed beneficially for the general creditors, and it is so declared in an unusual manner in the first clause of the Act."

* The Court of Queen's Bench, applying the same prin- * 611
ciple of construction to the 6 Geo. IV. c. 16, held, in *Wright v. Fairfield*,³ that a right of action in respect of a breach of contract to supply goods passed to the assignees, although on a rigid construction the words of the statute might not be precisely applicable. Mr. Justice Littledale there stated it to be his opinion that the legislature intended that the assignees should have power to sue upon contracts made with the bankrupt, and for injuries affecting his personal property. And that was an action, not for any debt or sum certain, but for unliquidated damages, to be ascertained by a jury. Again, in *Porter, assignee of Hurland, v. Vorley*,⁴ the bankrupt had before his bankruptcy let to the defendant a phaeton, which he undertook to use in a proper manner, but through his negligence it was overturned and damaged. Plea, general issue. The phaeton was not the property of the bankrupt, but one which he had hired, and the real owner repaired it, and proved the amount under the commission; but the bankrupt's estate had not paid and was not likely to pay any dividend, so that no loss to the personal estate of the bankrupt had been sustained; nevertheless, it was held that the right of action for the breach of contract committed before the bankruptcy passed to the assignees, and that they were entitled to nominal damages; and upon the same principle I apprehend that the right of action in *Marzetti v. Williams*,⁵ would have vested in the assignees had a bankruptcy occurred.

It seems to me, therefore, that according to the construction which has been put upon the bankrupt acts from the 34th & 35th Hen. VIII. to the present time, rights * of action * 612

¹ 12 Rep. 1.

² 2 Barnewall & Adolphus, 727.

³ 1 Atkyns, 165, 183.

⁴ 9 Bingham, 93.

⁵ 1 Barnewall & Adolphus, 415. But see post 641.

vested in the bankrupt before his bankruptcy pass to his assignees, either as goods or as part of his personal estate. Such being the general rule, have the Courts of Westminster Hall by their decisions engrafted any exceptions upon it?

In *Wright v. Fairfield* (already referred to) Mr. Justice Little-
dale says, that rights of action for mere personal wrongs, and such
causes of action as would abate by the bankrupt's death, would not
go to the assignees; the opinion certainly of a very learned Judge,
but not a decision on the point.

In *Benson v. Flower*,¹ an action on the case for words had been
brought by the party injured, before his bankruptcy, and he had
recovered a verdict and issued execution, and the sheriff had
levied the damages, when the assignee moved to have the money
paid over to him, which was refused by the Court, which decided
“that before judgment an action on the case for words cannot be
assigned by the statute, but after the judgment, when this is
reduced to a certainty, it may be assigned; so may the money of
the bankrupt, and this money, if he had received it; but before
he has received it, and while it remains in the hands of the sheriff,
it cannot be assigned.” In Comyns's Digest,² this case is cited as
an authority for saying that the commissioners may sell monies
due to the bankrupt on a judgment. The same case is reported
twice in Cro. Car.,³ and by those reports it appears that the ground
of the decision was that the money in the hands of the sheriff was
in custodia legis, and ought to be paid to the party who could

* 613 acknowledge satisfaction on the record, which * was the
bankrupt only, as the bankruptcy occurred between the
issuing and return of the writ of execution. *Benson v. Flower*
therefore is not an authority for the decision of the present case.
But the dictum of Mr. Justice Littledale in *Wright v. Fairfield*,
and the decision of the Court of Exchequer in *Howard v. Crow-*
ther,⁴ are authorities for saying that rights of action for injuries to
the person or feelings of a bankrupt do not pass to his assignees;
and where the cause of action is of such a nature that it would die
with the party, there is much reason for saying that it cannot be
severed from his person during his life, and vest in an assignee
under the bankrupt laws. Probably the true ground has been
suggested by Mr. Justice Williams.

¹ Sir W. Jones, 215.

² Pages 166 and 176.

³ Tit. Bankrupt D. 16.

⁴ 8 Meeson & Welsby, 601.

In *Clark v. Calvert*,¹ *Rogers v. Spence*,² and *Brewer v. Dew*,³ it was decided that rights of action for trespass to land or goods in the actual possession of a trader do not pass to his assignees if he becomes bankrupt, because those rights of action are given in respect of the immediate and present violation of the possession of the bankrupt, independently of his rights of property, and are an extension of the protection given to his person, and the primary personal injury to the bankrupt is the principal and essential cause of action.

On the one hand, therefore, we have it established, that by the bankrupt laws it was intended that every right vested in the bankrupt of which profit could be made, including rights of action, should pass to the assignees, and on the other, that the right to recover a *satisfaction in damages for a personal *614 injury is to be excepted out of that general rule. It remains to be considered whether the present case falls within the rule or the exception.

The declaration, after setting out the whole of the agreement entered into, assigns as a breach that the defendants would not employ the plaintiff, or suffer him to remain in their service for the seven years mentioned in the agreement, but wrongfully and unjustly, without any reasonable or sufficient cause, dismissed and discharged him from their service, and so, "the plaintiff says, the defendants did not perform their agreement, but therein made default, and thereby, and according to the said agreement and their promise, became liable to pay the said sum of 500*l.* in the agreement mentioned, and thereby fixed and agreed on as specific damages on such breach and default." The plaintiff therefore does not complain of any personal injury, of any personal suffering or inconvenience occasioned by the defendants' breach of contract. He claims damages merely by reason of that breach. He claims indeed 500*l.* as liquidated damages; but, according to *Kemble v. Farren*,⁴ that sum must in this case be treated as a penalty. If the plaintiff could have claimed that as an ascertained sum payable on the breach of contract by the defendant, it seems to me that it would have been impossible to contend that the right to it would not have passed to his assignees as part of his personal estate; but in that case the

¹ 8 Taunton, 742.

² 13 Meeson & Welsby, 571, affirmed. 12 Clark & Finnelly, 700.

³ 11 Meeson & Welsby, 625.

⁴ 6 Bingham, 141.

money would still have been payable as a compensation in respect of the very same breach of contract that is now in question, the only difference being, that in that case the damages would
 * 615 have been ascertained * by agreement of the parties, whereas now they are left to be ascertained by a jury. And although the sum mentioned in the agreement is in this case a penalty, and cannot be claimed as liquidated damages, an action of debt might have been maintained for it when the contract was broken ; *Winter v. Trimmer*,¹ *Harrison v. Wright*,² and but for the Statute 8 & 9 Wm. III. c. 11, the plaintiff in such action would at law have been entitled to judgment and execution for the whole sum. The penalty then on the breach of the contract became a debt, and, as it seems to me, passed under the assignment to the assignees, and they might have sued for it, although bound to assign breaches under the Statute 8 & 9 Wm. III. cap. 11.

It is true that the party to such an agreement has an option, either to sue in debt for the penalty or in assumpsit for unliquidated damages ; but I apprehend that such a party becoming bankrupt after breach of the contract, cannot, by electing to sue in assumpsit, deprive his assignees of the right to sue in debt, or render the other contracting party liable to two actions. The case of *Chippendall v. Tomlinson*, in Douglas,³ reported in Cooke's Bankrupt Law,⁴ does not appear to me to have any bearing on this question. That was an action by a bankrupt for his work and labour done after the bankruptcy. I agree that a contract for the future work and labour of the bankrupt cannot be made by the assignees ; they cannot hire him out (as was said by Lord Mansfield), and, as a consequence, the assignees cannot, after bankruptcy, adopt and enforce a contract made before the
 * 616 bankruptcy, for the application * of the personal skill or labour of a bankrupt ; but I do not think it thence follows that, where a contract to employ a trader has been broken before his bankruptcy, the assignees cannot sue upon that breach, it having been established that rights of action in general are vested in the assignees.

Upon the whole, it seems to me that this case falls within the general rule, and is not within any of the established exceptions ; and that, even if nominal damages only are to be recovered, the

¹ 1 W. Blackstone, 395.

² 4 Douglas, 318.

³ 13 East, 343.

⁴ Pages 260, 431.

right to sue for them is in the assignees, according to the decision in *Porter v. Vorley*,¹ although no actual loss may have been sustained by the bankrupt's estate.

MR. JUSTICE WIGHTMAN. — It appears to me that the judgment of the Court of Exchequer Chamber in this case was right, and that the plea of the bankruptcy of the plaintiff was an answer to the action.

The action was in assumpsit, to recover a sum of 500*l.* agreed to be paid by the defendants to the plaintiff in case they broke a contract made by them with him to employ him for seven years, as their foreman, in the business of type-founders and letter-press printers, at three guineas a week; the defendants discharged the plaintiff from their service before the bankruptcy; refused any longer to employ him; and there was a perfect right of action in him in respect of such breach of the agreement at the time of his bankruptcy; and the question is, whether that right of action passed to his assignees.

By the 6 Geo. IV. c. 16, § 63, all the present and future personal estate of the bankrupt, and all the debts * due * 617 to him, pass to the assignees. Those words have a very comprehensive signification, and include not merely goods and chattels, and debts properly so called, but rights of action for breaches of contract which in any way affect the personal estate of the bankrupt; and, in short, as expressed by Lord Tenterden in *Wright v. Fairfield*,² “every beneficial matter belonging to the bankrupt's estate.” There are, however, some exceptions to the generality of the right of the assignees. In cases where the personal estate is only affected through some wrong or injury to the person or the feelings of the bankrupt, and the loss or gain to the personal estate would be greater or less according to the compensation given for such injury, whether by breach of contract or otherwise, the right of action would not pass to the assignees. Rights of action for breach of promise to marry, for torts to the person, for libel or slander, are instances of exceptions to the general rule. It may be also that the right to enforce unexecuted contracts will only pass to the assignees in cases where the assignees themselves could perform that which the bankrupt himself was to perform, as held in the case of *Gibson v. Carruthers*.³

¹ 9 Bingham, 93.

² 8 Meeson & Welsby, 321.

³ Barnewall & Adolphus, 727.

The present case, however, does not fall within any of the exceptions. The cause of action was complete at the time of the bankruptcy; there was nothing to be done on the part of the bankrupt but to bring his action, and recover the 500*l.*, or so much of it as the jury might be disposed to give him. Neither the person nor the feelings of the bankrupt were affected, except so far as the breach of contract affected his personal estate.

*618 The refusal to employ the plaintiff at a salary * of so much a week no doubt affected his personal estate; and upon the general principle I am disposed to think that the judgment of the Exchequer Chamber was right, as none of the exceptions appears to apply to this case.

There is, however, another ground upon which I think the judgment of the Court of Exchequer Chamber right, though it is not given as a reason in the judgment. The parties mutually agreed that either party failing to perform the agreement should pay to the other the sum of 500*l.* by way of or in the nature of specific damages. It may be admitted that since the cases of *Astley v. Weldon*,¹ and *Kemble v. Farren*,² it can hardly in this case be contended that the 500*l.* could be recovered as agreed and liquidated damages, but that that sum is a penalty only. But I am not aware of any objection in point of law to an action of debt being maintained for the amount of the penalty, subject to the provisions of 8 & 9 Wm. III. c. 11, § 8, which applies, according to its terms, "to all actions for penal sums for non-performance of any agreement contained in any indenture, deed, or writing."

If the penalty had been imposed in an indenture between the parties, I apprehend there can be no doubt but that an action of debt might have been maintained for it, subject to the provisions of that statute; and I cannot distinguish between the case of a penalty in an instrument under seal and a penalty in an instrument not under seal. The penalty is in legal contemplation the debt, subject to the provisions of the statute so far as they may be applicable; and it is to be observed that the statute is

*619 not confined by its terms to actions for * penal sums in instruments under seal, but is general, and would include all actions for any penal sum in any instrument whatever.

In this view of the case the right of action is for a debt, and

¹ 2 Bosanquet & Puller, 346.

² 6 Bingham, 141.

therefore within the very words of the Bankrupt Act, and would pass to the assignees; and the form of the action can make no difference. I am, therefore, of opinion that the judgment of the Exchequer Chamber is right.

BARON ROLFE. — After full consideration of this subject, I see no reason to abandon the opinion I formed when the case was originally brought before the Court of Exchequer. The sum of 500*l.* though spoken of as a sum to be recovered by way of liquidated damages, is certainly to be treated merely as a penal sum, and not as the amount to be recovered for any breach (whether more or less important) of any of the stipulations of the contract. The right of the plaintiff therefore under the contract, if there had been no bankruptcy, would have been, not to recover a sum of 500*l.*, but to recover such a sum as a jury should consider a fair compensation for the injury resulting from his unlawful dismissal. Is the right to recover such a sum part of his personal estate within the true intent and meaning of 6 Geo. IV. cap. 16, § 63? I think it is not.

The general rule is, that all rights of action in respect of injuries to the bankrupt's estate pass to his assignees. They take the *estate*, and, as incident to it, all rights of action relative to the estate, whereby it may be increased or improved. This was the ground of the decision in *Wright v. Fairfield*.¹ On the * other hand, they do not take (so to say) the person of *620 the bankrupt, and so neither can they maintain actions whereby his person is to be compensated for injuries it may have sustained. This was the principle on which the decision proceeded in *Howard v. Crowther*.²

Then under which of these classes does the present case range itself? I think under the latter. The only breach alleged is, that the defendants did not employ the plaintiff or permit him to remain in their service for the residue of seven years, but wholly refused so to do, and wrongfully dismissed and discharged him. Now for this breach the defendants are liable to make compensation in damages, even though it could be shown that the personal estate had received no injury, or even had been benefited by their act. Suppose, for instance, that it had been shown that the employment of the plaintiff by the defendants was of a very health-

¹ 2 Barnewall & Adolphus, 727.

² 8 Meeson & Welsby, 601.

ful and agreeable nature, and that in consequence of his dismissal he had obtained a more lucrative but at the same time an unwholesome and much less agreeable occupation: there would have been in such a case no injury, but rather a benefit to the personal estate, and yet it is clear there would have been a breach of contract on the part of the defendants, and so a right of action against them by some one; not certainly by the assignees, for they as representatives of the estate would not have sustained damage, but by the bankrupt himself, with whom the contract was made, and who would be the only party injured.

This seems to me to be precisely the present case. There is nothing to show that the breach assigned in the declaration * 621 caused any injury to the bankrupt's estate. It is not even averred that the defendants did not regularly pay the weekly wages stipulated for. The grievance complained of is simply the refusal to employ the plaintiff, and the dismissal of him from the service of the defendants. Any compensation to be recovered for this wrong appears to me to be connected solely with the person of the bankrupt, and not to be an incident to his estate. The right of action therefore remained in him, and did not pass to his assignees as part of his personal estate.

For these reasons I am of opinion, in answer to the question propounded by your Lordships, that the plaintiff in error, who was the plaintiff in the action, is entitled to judgment.

MR. JUSTICE MAULE. — I am of opinion that the defendants in error are entitled to judgment.

This was an action on a contract by which the defendants agreed to employ the plaintiff as their foreman in their business of type-founders, &c. for seven years at certain wages, containing a clause by which the parties agreed that if either of them should fail to perform the agreement, the party failing should pay to the other the sum of 500*l.*, by way or in the nature of specific damages. The breach complained of in the declaration was, dismissing the plaintiff from the service before the end of the seven years, and refusing to employ him further. It appears by the record that after the right of action accrued, the plaintiff became bankrupt, and the question of his right to judgment depends on whether such a cause of action passes to the assignees of a bankrupt. There is no doubt that the right to bring an action for an injury

to the person, character, or feelings of a bankrupt does not pass to the assignees, and that the right to bring an action for the payment of money * agreed to be paid to the bankrupt * 622 does pass. And it appears to me that the present action is in effect an action on a contract to pay money. The clause by which in the event that has happened, the master agreed to pay the servant 500*l.*, is certainly in its terms an agreement to pay money, and though the construction which the law requires to be put upon it prevents the whole sum from being payable when it would be more than a reasonable compensation for a failure of performance, it is not thereby rendered wholly inoperative, but it retains the effect of binding the failing party to pay such part of the sum as may be reasonable in respect to the failure. Such a clause is still therefore a clause binding to the payment of money, whether the amount be ascertained or not; and it appears to me that the right to recover a pecuniary demand so expressly stipulated for, passes to the assignees as part of the personal estate of the bankrupt, whether the amount be ascertained or not. Thus, although a right of action for not marrying or not curing, in breach of an agreement to marry or cure, would not generally pass to the assignees, I conceive that a right to a sum of money, whether ascertained or not, expressly agreed to be paid in the event of failing to marry or to cure, would pass. The agreement of the parties that money shall be paid as compensation makes, as it seems to me, the right to recover that money a part of the personal estate of the bankrupt, as much as a recovery, before the bankruptcy, of a judgment in an action for an injury to the person or character of the bankrupt, would do.

BARON PARKE. — The question proposed by your Lordships is, whether the plaintiff or the defendant in error is entitled to judgment.

It was my duty to deliver the judgment of the Court * of * 623 Exchequer, consisting of my brothers Alderson, Rolfe, my late brother Gurney, and myself, when this case was decided by that Court,¹ and to assign the reasons which induced me to form the opinion then expressed. The discussion of the case on the writ of error at your Lordships' bar, and the subsequent consideration of it, and of the judgment of the Exchequer Chamber, have in-

¹ 8 Meeson & Welsby, 846.

duced me to think that the reasons so assigned by me are insufficient.

One of the causes that has led me to doubt the propriety of that decision is, that a *penalty* is given for the non-performance of this agreement: for it is clear, that, according to the cases of *Kemble v. Farren*,¹ and others, though the sum of 500*l.* is said to be for "specific damages," it is to be construed as a penalty; and whether that penalty would vest in the assignees under the circumstances of this case, is a question which I propose afterwards to consider. But I assume for the present, that the case is in the same position as if there was no penalty; on which footing it has been argued at your Lordships' bar and in the Court below. I would premise that it is not necessary to say any thing upon a question discussed in the Court below, whether all the defendants are liable upon a contract, though in writing, made by one in reality on his own behalf, and as agent for the others. There is now no doubt upon this point; both the Courts below concur in this respect; nor was it disputed in the argument here. The principal question in the case on the above-mentioned assumption is, whether the right of action for a breach before bankruptcy of such a contract as this, for the personal services of the bankrupt, passes to the assignees.

* 624 * The general question turns on the 6th Geo. IV. c. 16,

§ 63, which must be construed with the aid of the twelfth section, and with that of former decisions upon the repealed statutes relative to bankrupts. By that section, "all the present and future *personal estate* of the bankrupt, wheresoever found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed to, or come to him before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same shall be found or known, are assigned, and such assignment is to vest the property, right, and interest in such debts, as fully as if the assurance whereby they are secured had been made to the assignees, and they have the same remedy to recover as the bankrupt would have had."

A former section (12) enabled the Lord Chancellor to appoint commissioners, with full power and authority to make such order and direction as to the lands, monies, fees, offices, annuities, goods, chattels, wares, merchandises, and debts, wheresoever

¹ 6 Bingham, 141. See *Thompson v. Hudson*, Law Rep. 4 H. L. 1.

they may be found or known. The two sections are to be read together.

It is not disputed that the rights of the assignee under the statute law are not identical with, nor are they so extensive as those of an executor, who stands in the place of his testator, and represents him as to all his personal contracts, and is by law his assignee,¹ and therefore may maintain any action in his right which he himself might.² That must be understood to mean any action on a *contract*, for an executor never could sue for wrongs to his testator; "*actio personalis moritur cum personâ*." And with respect to contracts, *some exceptions have been in- * 625 troduced by modern decisions; *Chamberlain v. Williamson*,³ *Kingdon v. Nottle*,⁴ as explained by Lord Abinger in the case of *Raymond v. Fitch*,⁵ and the executor cannot sue upon contracts the breach of which is a mere personal wrong. The executor takes all the other personal rights of a testator, as a consequence of his representative character, whether they are available for the payment of debts or not, for his liability to pay debts is the consequence, not the object, of the appointment. The assignee is created by statute, for the purpose of recovering and receiving the estate, and paying the debts of the bankrupt, and takes only what the statute gives for that purpose. What then does it give? It clearly gives in the section above mentioned, not merely all personal chattels, securities for money, and debts properly so called, but all unexecuted contracts which the assignee could perform, the performance of which would be beneficial to the bankrupt's estate. These are "*personal estate*." The assignee takes, in the language of Lord Tenterden in *Wright v. Fairfield*,⁶ all "the beneficial matters" belonging to the bankrupt; or, as Mr. Justice Buller said, "any thing belonging to the bankrupt that can be turned to profit." *Smith v. Coffin*.⁷

This contract, if unexecuted, would clearly not have passed to the assignees. But the question is, not whether the contract, but whether the right of action for the breach of it before the bankruptcy, passed. The words "*personal estate*" clearly comprise all chattels, * chattel interests, and all the subjects * 626

¹ Wentworth Off. Exor. 100. ² Crompton, Meeson & Roscoe, at pp. 598, 599.

³ Bac. Abr. Executors N. ⁴ 2 Barnewall & Adolphus, at p. 732.

⁵ 2 Maule & Selwyn, 408. ⁶ 2 H. Blackstone, at p. 462.

⁷ 1 Maule & Selwyn, 355, and 4 Maule & Selwyn, 53.

mentioned in the twelfth section ; and they also comprise *some* rights of action which are not properly debts, and would not pass under the word "debts," but do pass under the description of "personal estate."

For instance, some actions for torts do pass. Actions for injuries to personal chattels, whereby they are directly affected, and are prevented from coming to the hands of the assignee, or come diminished in value, undoubtedly pass. The action of trover for a conversion before the bankruptcy is a familiar instance of this.

On the other hand, rights of action for injuries to the person, or reputation, or the possession of real estate, do not pass. Actions of assault, for example, and for defamation, actions on the case for misfeasance, doing damage to the person, for trespass *quare clausum fregit* (*Rogers v. Spence*¹), actions for criminal conversation with the wife, or seduction of the servant or daughter of the bankrupt, are not transferred to the assignee, even though some of these causes of action may be followed by a consequential diminution of the personal estate, as where by reason of a personal injury a man has been put to expense, or has been prevented from earning wages or subsistence ; or where by the seduction the plaintiff has been put to expense ; *Howard v. Crowther*.² But with respect to contracts ; rights of action for the breach of such as directly affect the personal estate, whereby the assignee is prevented from receiving part of it, or its value is diminished, are certainly transferred ; as for example, rights of action on

* 627 a beneficial * contract, whereby one engaged to sell and deliver goods to the bankrupt, and which, if performed, would have put him in the possession of the goods, or a contract with another to carry or take care of the goods of the bankrupt which are lost, or injured, and thereby diminished in value.

On the other hand, actions for the breach of contracts personal to the bankrupt, unaccompanied by an injury to the personal estate, as a contract to carry him in safety, to cure his person of a wound or disease, or a contract with a person, who subsequently becomes bankrupt, to marry, are certainly not assigned. This is conceded ; but it is questioned on the part of the defendant in error, I think without sufficient ground, whether the assignee would not be entitled to sue in any of these cases, if the personal estate was con-

¹ 13 Meeson & Welsby, 571 ; affirmed in this House, 12 Clark & Finnelly, 700.

² 8 Meeson & Welsby, 601.

sequently damaged, as where the bankrupt was put to expense by the breach of contract, or lost the power of earning money.

What then is the proper construction of this section of the Act, according to its words and the several cases decided upon it? The proper and reasonable construction appears to me to be, that the statute transfers not all rights of action which would pass to executors (for rights incapable of being converted into money, such as the next presentation to a void benefice, pass to them), but all such as would be assets in their hands for the payment of debts and no others, — all which could be turned to profit, for such rights of action are *personal estate*. Of such the executor is assignee in law; and the nature of the office and duty of a bankrupt's assignee requires that he should have them also. But rights of action for torts which would die with the testator, according to the rule, *Actio personalis moritur cum persona*, and all actions of contract affecting the person only, * would not * 628 pass. Of such the executor is not assignee in law; and whatever may be the reason of the law which prohibits him from being so, seems equally to apply to a bankrupt's assignee.

According to this rule, the description of contracts upon which the right of action is transferred, would include, but would not be restricted to, such as directly affect some chattel or subject of property which would pass to the assignees, or to such as would, if they had been performed, have produced such property, which alone, it was argued at your Lordships' bar, would be transferred by the statute; and this was in accordance with the view I took in the Court below. I think, upon subsequent reflection, that this is too narrow a construction of the statute, and that it applies to all contracts for the breach of which an executor could sue, which could be turned to profit for the payment of creditors. And if this be the true construction of the statute, if *all* the damages for this breach of contract could have been recovered by an executor, the assignee could recover them, and the plea would be a good plea in bar.

But if part was recoverable for the personal inconvenience of the bankrupt, a different question presents itself. I think this contract cannot be said not to relate in any part to the person of the bankrupt, but that his personal inconvenience and trouble in looking out for a new employment would be part of the damages recovered. If so, that part could not be transferred to the as-

signees, and ought not to be lost; the right to those damages, which would be lost in the case of a testator's death altogether, continues in the bankrupt. It is upon this point that the case appears to me to turn. Who then are to sue for the breach of contract where part belongs to the assignee, part to the
 * 629 bankrupt? * Who would have to sue if the contract was to cure the bankrupt of a disease, and give him a sum of money, and there had been a breach of both parts, which appears to me to be a similar question? It is extremely difficult to say in whom the right of action would be.

Either the right of action on the contract must be divided, and each sue, or the right of action altogether must remain in the bankrupt, or altogether be transferred to the assignees, or both must join, the contract being entire, to sue for the damages. In the first two cases the plea would be good, in the last two bad; for in the first it would be no answer to the entire cause of action; in the second, it would be no answer to any part. I should feel considerable difficulty in deciding the question, but this case does not depend upon it, for I have now to consider what the effect of the penalty is.

This subject was not discussed at your Lordships' bar, and was little adverted to in the Court below.

At common law the penalty would have been forfeited, and, being a sum certain, would have passed to the assignees; for, at the time of the bankruptcy it would have been uncertain whether the defendant would ever have filed a bill for relief, supposing he could have done so; and a sum certain, defeasible on an uncertain event, would have been, until defeated, personal estate, and would certainly vest in the assignees. But the question is, whether the Statute 8 & 9 Wm. III. c. 11, has not made an alteration. That statute in effect makes the bond a security only for the damages really sustained. If all the damages would be recoverable by the assignees, the penalty would pass; if none, the penalty could not be levied, and therefore could not be available for the payment of
 creditors, and probably would not pass to the assignees. If
 * 630 part of the damages * could be recovered by the assignees, and part not, the question is different. The penalty would then be a security for damages partly belonging to the assignees, partly to the bankrupt. It would be like the case of a bond to the bankrupt conditioned not to assault him, and to pay him a sum

of money, forfeited in both respects before the bankruptcy; and I have had some difficulty in saying whether the right of action on such a bond would or would not pass to the assignees.

But it seems to me to be clear that the penalty, which is an entire thing, could not be divided, so that each could sue for a part; and it could not be predicated what part would pass to each. It follows, therefore, that either the right to the entire penalty must remain in the bankrupt, or that either both the bankrupt and the assignee must join, as being both interested, or that the right to sue goes to the assignees, in order to secure such part of the damages as is the personal estate of the bankrupt vested in them. I cannot help thinking that both ought to sue, as they would do if the bankrupt before his bankruptcy had assigned a part of an entire debt as a security to a creditor, and consequently was a trustee for him for that part. But, at all events, I do not think the right to the penalty would remain in the bankrupt; and therefore the plea is a good plea, as it shows that the bankrupt could not sue alone.

Therefore, in either view of the case, I now think the judgment of the Court of Exchequer should be reversed, and the judgment of the Exchequer Chamber affirmed. If the whole of the damages are part of the personal estate which passed to the assignees, the plaintiff was barred; if some were, and some were not, still for the reasons before mentioned the plea appears to me to be good, and my opinion which I expressed in the Court below was wrong.

* My opinion now, therefore is, that the plea of the plaintiff's bankruptcy is a good bar, and that the judgment of the Exchequer Chamber ought to be affirmed. * 631

LORD CHIEF JUSTICE WILDE. — In answer to the question upon which your Lordships have been pleased to ask the opinion of the Judges, whether the plaintiff in error, or the defendants in error, are entitled to judgment; I beg to state that I am of opinion that the defendants in error are entitled.

The action is brought to recover the sum of 500*l.*, which is alleged to have become forfeited and payable under the agreement between the parties, by reason of a breach of the stipulation on the part of the defendants in error to employ the plaintiff in error for a certain period, at a specified rate of remuneration; such breach of contract having occurred before the bankruptcy of the plaintiff in

error, and the right of action therefore having accrued to him before his bankruptcy.

The money claimed by the declaration is not recoverable as liquidated damages, but is a sum in the nature of a penalty, in respect of which therefore, although such sum constitutes a debt at law, execution would be restrained and limited to the amount of the actual damage to be assessed by the jury.

It has not been disputed at the bar, that a right of action to recover damages for the breach of a contract, which has accrued to a bankrupt before the bankruptcy, is part of the personal estate of such bankrupt within the meaning of the statutes in bankruptcy, and will in many cases pass to the assignees; and further, that it is no objection to the assignees' right to recover such damages, that they are unliquidated. It is therefore unnecessary to refer to authorities establishing those propositions.

* 632 *The objection to the plea of the bankruptcy of the plaintiff in this case is, that the right of action set forth in the declaration is founded upon a contract which related to the personal skill and labour of the plaintiff, and which therefore the assignees could not have performed. I am of opinion that this objection is not well founded, but after the opinions which have been expressed by those of my learned brethren who think that the defendants in error are entitled to judgment, I shall content myself with stating generally the principles and grounds upon which my opinion is formed.

It is to be observed that at the time of the bankruptcy the contract was not *in fieri*; the performance of it was no longer a matter open between the parties, but had been determined by the actual dismissal of the plaintiff in error, by the defendants, from their service. The relation of the parties to the contract entirely changed when the defendants in error dismissed the plaintiff from their employ, and thus determined the contract—and the only open point between them at that time was the right of the plaintiff to recover damages for the previous breach of the contract; and the rights of the assignees depend upon the condition, or relation of the parties at the time of the bankruptcy, and are not in my opinion affected by the considerations applicable to the relation which had antecedently existed between the parties, and to which former relation totally different legal incidents attached; that is to say, the question whether a right of action, actually vested in the bankrupt

prior to the bankruptcy, in respect of a contract determined, passes to the assignees, is not affected by the consideration whether the contract, if it had not been determined but remained open and *in fieri* at the time of the bankruptcy, would have passed to the * assignees, and could have been performed by them. * 633 The questions are totally distinct from each other; and in like manner, if salary or wages, or commission under a contract of service, are due at the time of the bankruptcy, the right to recover such wages, salary, or commission, would pass to the assignees as part of the personal estate, without regard to the consideration of whether the contract or services had had relation to the personal skill or labour of the bankrupt, or any confidence reposed in him, or whether the contract could have been performed by the assignees.

It is said this is an action personal to the bankrupt; and in one sense it no doubt is so; but not in any sense material to the question to be determined. It is personal in the sense, that it arose out of a contract founded in the personal confidence in the bankrupt, and which could only be performed by his personal labour and skill; and in the same sense contracts are personal, made with factors, salesmen, agents of various kinds, masters of ships, bankers, attorneys, architects, engineers, and various other persons whose personal skill, knowledge, and integrity are the inducements to the contracts. In no such contract could assignees claim to perform the contract if it remained open, unless the bankrupt would voluntarily assist them in so doing, and then not in every case; but surely it cannot be contended that the right of action for breaches of contract in relation to such employments accruing before the bankruptcy would not pass to the assignees; and I think the consequences to the creditors under the bankruptcy of many traders would extend much beyond what have been taken in consideration, if it is law that no rights of action can pass to the assignees in respect of breaches of such contracts occurring before the bankruptcy.

* The right of action under consideration was undoubtedly part of the personal estate of the bankrupt; and the residue of that estate which would come to the possession of the assignees must be intended in law to be less, and must have been, in fact, less, by the defendants in error having withheld the remuneration payable under the contract. * 634

The action is brought to recover pecuniary compensation in respect of a pecuniary injury ; and it does not seem to me to be a ground why the right to recover such pecuniary compensation should not pass to the assignees ; because a case may be surmised in which a bankrupt might by possibility be entitled to recover damages for some consequential injury other than pecuniary, which would not pass to the assignees, this case presenting no ground for any such surmise.

The cases of exception to the rights of action passing to assignees seem to me to be very distinguishable from the present case. The right of action for a trespass does not pass, because trespass can only be maintained by the party whose actual possession is intruded upon ; but I apprehend that if the trespasser has done actual damage to the personal estate of the bankrupt, as well as committed a trespass upon his possession, there is no authority which decides that assignees may not maintain an action in respect of the diminution in value, or injury to the chattels, that have passed to them under the bankruptcy.

This is a case of contract, and the cases in which it has been held that the right of action for a breach of contract before the bankruptcy did not pass to the assignees were cases where the gist of the action was not the pecuniary damage, but the injury to the feelings, and in those cases, although pecuniary damage * 635 may * have been incidental or accessary, it was not the principal injury, and the right to recover the incidental damages was not severable from the principal. Such cases are clearly distinguishable from a case in which the pecuniary damage, and not the injury to the feelings, is the cause of action.

A third class refers also to injuries or wrongs strictly personal to the bankrupt, such as injuries to his person or character. In such cases, it is true, pecuniary compensation is sought to be recovered ; but the pecuniary injury is not the measure of the damages recoverable ; and such cases also seem to me to be essentially distinguished from actions for breaches of contract, in which the pecuniary injury is not only the gravamen of the action, but also the measure of the damage which the party is entitled to recover.

It has been decided, and seems now unquestionable, that under the existing statutes of bankruptcy the same rights pass to assignees as would have passed under any of the previously exist-

ing statutes in bankruptcy. *Wright v. Fairfield*,¹ in which Lord Tenterden stated, and the other Judges concurred, "that the object of that statute was to give the assignees, for the advantage of the creditors, every beneficial matter belonging to the bankrupt's estate." Therefore, as at the time of the bankruptcy the right of action to recover damages for the nonpayment of the stipulated pecuniary compensation was a beneficial matter belonging to the bankrupt's estate. I think it passed to the assignees, either as personal estate or as a debt due to the bankrupt, as suggested by Mr. Justice Park and Mr. Justice Taunton in *Wright v. Fairfield*, — * and I think that the plea is well * 636 pleaded in this case according to the doctrine in *Kinnear v. Tarrant*,² in which it was held that where the defendant has a day in Court to plead, he has never been prevented from pleading the bankruptcy of the plaintiff in bar of his recovery.

I have only further to observe that no injury is done to the bankrupt by holding such a plea as is pleaded to this action to be good, because it is clear that if he were allowed to incur the expenses of prosecuting the action to judgment, the assignees would have a right to interpose and take the fruits of such judgment.

I have not thought it necessary to trouble your Lordships by a reference to the numerous cases in which defendants have been precluded from pleading the bankruptcy of the plaintiff in actions arising out of transactions subsequent to the bankruptcy; because in most, if not in all of such cases, third persons have sought to interpose the title of the assignees, without interference on their part; which it has been held they could not do, such third persons having by contracting with a bankrupt treated him as a competent contracting party, and it being optional in the assignees in such cases to adopt the contract or not; but I am not aware that even under such circumstances there is any case in which, where the assignees have interposed by notice or demand, and claimed the benefit of the contract, they have been prevented from so doing.

For these reasons my answer to your Lordships' question is, as I have before stated, that the defendants in error are entitled to judgment, independently of the question of the effect of the action * being brought to recover the sum inserted in * 637

¹ 2 Barnewall & Adolphus, at p. 732.

² 15 East, 622; 1 Rose, 350.

the contract by way of penalty ; but I am also of opinion, for the reasons assigned by my learned brother Williams, that that circumstance would also entitle the defendants to your Lordships' judgment in this case.

1849. July 27.

LORD BROUGHAM. — In this case, my Lords, you have had the inestimable benefit of the attendance, and subsequently of the opinions, of the learned Judges, upon a question of very great importance. It is whether an action being brought to recover the sum of 500*l.*, alleged to have been forfeited and payable under an agreement between the parties, by a refusal on the part of the defendants in error to employ the plaintiff in error, for a certain period, at a specified rate of remuneration, such breach of contract having occurred before his bankruptcy, the question is whether, under these circumstances, that right of action passes to his assignees.

The learned Judges have unfortunately differed upon this subject. There are seven of them, who have given an opinion that it does pass ; and there are two who have given an opinion that it does not pass. Baron Parke, who originally thought that the right of action did not pass, has changed his opinion : therefore, there are seven of these learned Judges who are for the defendant in error, and only two, Baron Rolfe and Baron Platt, who hold with the plaintiff in error.

I certainly have come to the opinion I have formed after considerable doubt, — a doubt very natural for any one to entertain when he sees the learned Judges divided, — and the more
 * 638 so on attending to the circumstance, * naturally giving rise to more doubt, that so learned a Judge as Baron Parke (now the senior Judge on the Bench) had at one time held one opinion, and at another time held a contrary opinion. With all the distrust, therefore, of my own judgment which that difference of opinion between the Judges, the change of opinion of one Judge, and the difference of the others from their brethren, is calculated to inspire, I have felt very great anxiety in considering this case ; but I have now come to a very confident opinion in favour of the sentiments which have been conveyed to your Lordships by seven of the Judges, differing from the minority of two.

My Lords, I am clearly of opinion that if you were to scan very minutely the sections of the Bankrupt Act, the 6th of Geo. IV. c. 16, namely, the 12th and the 63d sections, upon which all these questions turn, you would not from them, unassisted by more general views and unaided by the light of judicial decisions, come to a very clear opinion that a right of action for damages of this kind passed to the assignees. But when you come to look at the decisions upon this subject, it seems to me quite impossible to doubt that you must carry the case a little further than the very words of these sections do ; or at least that you must give them, in favour of the creditors, remedially, a larger construction than otherwise, and in another case, you might be disposed to affix to them.

The case of *Wright v. Fairfield*¹ is one which clearly goes in that direction and to that point. That was an action for unliquidated damages, which had accrued before the bankruptcy by the non-performance of a contract. It was a contract with persons acting on * behalf of his Majesty to furnish stone and * 639 execute masonry, and on default made by the bankrupt in providing such stone, it was agreed that the other party might determine the contract. The assignees of the bankrupt sued for damages, and all the learned Judges then held that the action was maintainable. Lord Tenterden, who had tried the cause, says, " I have not been able to entertain any doubt upon this point. It appears to me, that the object of the Act of 6 Geo. IV. c. 16, was to give the assignees, for the advantage of the creditors, every beneficial matter belonging to the bankrupt's estate." And all the learned Judges held, that the right of action having accrued to the bankrupt before the bankruptcy for the non-performance of the contract entered into by him with A., the damages to be recovered from A. for the non-performance of the contract with the bankrupt passed by assignment to the assignees under his commission. Mr. Justice Littledale says, " I am of opinion that the legislature in this statute intended to give assignees all the monies in respect of the property which they were entitled to under the former Acts, and that they should have power to sue upon contracts made with the bankrupt, and for injuries affecting his property, though not for mere personal wrongs, and such causes of action as would abate by his death."

¹ 2 Barnewall & Adolphus, 727.

It by no means follows, — though I agree that you are to draw the line, and not to give damages for injuries which are merely personal to the bankrupt, in which the cause of action *moritur cum persona*, and would not pass to the executors, that you are not, for instance, to give damages to the assignees under bankruptcy for loss of character sustained by the bankrupt, by slander, or

* 640 for the loss of service by the seduction of a * servant or a daughter, or for criminal conversation with the wife: although I agree that you are not to give damages in such cases to the assignees under the commission, it does not by any means follow that you are (as might be supposed from construing the 63d section with the 12th section of the 6 Geo. IV. c. 16, and taking that with the case of *Wright v. Fairfield*¹) to confine yourself only to cases where mere damages are to be given. The law goes further, as laid down in these cases, and it is shown to be this, that even where there is no actual damage proved, or even where the damage is merely nominal for a breach of contract, still, if that is in respect either of property or of a proprietary right, such as service or work and labour, as in the present case, even in that case it passes.

There is the case of *Porter v. Vorley*,² where before his bankruptcy Hurland, the bankrupt, had hired a carriage of M., and let it to the defendant Vorley. The defendant sent it back to the bankrupt damaged; M., the coach-maker, repaired it with the assent of the bankrupt, and the bankruptcy having immediately ensued, M., the person who had repaired it, proved the amount due for repair under the commission. Now there no dividend was paid, and yet it was held that the bankrupt's assignees had a right of action against the defendant. And it is expressly stated by the Lord Chief Justice, in delivering judgment in the case (the Court having taken time to consider the argument), "The consequence appears to us to be that the plaintiffs are entitled to nominal damages for the breach of a contract upon which they had the right to sue," and the verdict was so entered accordingly.

* 641 * Now your Lordships will perceive that that is a case of bare nominal damages, which could not be divided under the commission; and, therefore, it was not a question of property in the ordinary sense of the word, but merely of the right to sue

¹ 2 Barnewall & Adolphus, 727.

² 9 Bingham, 93.

though for nominal damages for a breach of contract, and yet it was held to be sufficient.

One of the learned Judges (Mr. Justice Cresswell) makes an observation,¹ the whole length of which I do not quite think it necessary for me to go along with him. He cites the case of *Marzetti v. Williams*,² and he says he apprehends that in that case, being a case of nominal damages, the right to sue would on the same ground have vested in the assignees. Now I have looked into the case of *Marzetti v. Williams*, which I argued on one side, and my noble and learned friend near me on the other, in the Court of King's Bench. It was an action for the nonpayment of a check by a banker. It was said that Marzetti, the party whose check had been refused payment, though there were funds, was damnified in his character as a solvent man and trader, and that was the argument upon which we placed our main reliance. In that case Marzetti had a right, no doubt, to obtain damages, though they might be only nominal for such injury personally to himself from the defendants, the bankers, who had refused payment of the check. But I do not nor need I, to support this judgment, go so far as to say that that particular right would have passed, as one of the learned Judges says in this case, to the assignees under the commission.

One point which is taken here is, that part of this was personal, and part of it was proprietary; that * part of it * 642 was a personal injury sustained by reason of the trouble he would be put to, not only in losing employment and the gains of it from the defendants, but in looking about for another employment. I entirely agree with another of the learned Judges, Mr. Justice Williams, in the answer which he gives to that. The learned Judge who uses that argument, says he considers that that is, as it were, the pivot upon which the decision might turn. "But," says Mr. Justice Williams, "it does not appear to me" (and I entirely go along with him) "that any damage would be recoverable in this action, in respect of any personal suffering, or personal inconvenience sustained by the bankrupt. The declaration is evidently framed in order to enable the plaintiff to recover as liquidated damages the sum of 500*l.*, which the agreement stipulates shall be paid in the way of specific damages, by either party who shall break the agreement, to the other; and, although judg-

¹ Ante, 611.

² 1 Barnewall & Adolphus, 415.

ment has in fact been obtained for a smaller sum, and the 500*l.* have therefore, in the result, been regarded as a penalty, and not as liquidated damages, still, the declaration expresses no claim for damages in respect of any personal suffering or inconvenience caused by the breach of the agreement declared on."

My Lords, upon these grounds, into which I need not go further, agreeing as I do with the learned Judges in general, without moot-ing another point raised by some of them, namely, whether in the case of *Wright v. Fairfield*,¹ Mr. Justice Littledale goes a little further in laying down the law — excluding all personal claims —

than is really the law ; without, I say, entering into that,
 * 643 which I hold to be perfectly unnecessary for the decision * of the present case, I am of opinion that your Lordships ought in this case, in accordance with the opinions of the large majority of these learned Judges, to give your judgment for the defendant in error.

LORD CAMPBELL. — My Lords, if this agreement had been without a penalty, and an action had been brought for unliquidated damages, I should have thought it a case of very great doubt. Because, under such circumstances, I apprehend that the action being brought after the bankruptcy, the bankrupt might have recovered compensation for what he had suffered subsequently to the bankruptcy ; and if damages awarded to him, and received in respect of what had taken place subsequently to the bankruptcy, were to go to the assignees, that would really be making the bankrupt a slave, to be hired out for the benefit of his creditors. It has been settled, over and over again, that for personal labour, or any thing personal respecting the bankrupt, the assignees have no claim.

But, my Lords, I really think that this case is free from difficulty, when we come to consider that this is an action upon an agreement, subject to a penalty, and that the action is brought for the penalty ; — and I cannot help expressing my surprise that in the Court below, and even at your Lordships' bar, so little attention was paid to that circumstance. It has been brought prominently before our notice by the learned Judges in their very valuable opinions. The facts of this case remove all doubt, because this agreement entitled the plaintiff to the sum of 500*l.*, upon a

¹ 2 Barnewall & Adolphus, at p. 732.

breach of the agreement. That was then a debt. That debt had accrued * before the bankruptcy, and under the * 644 express words of the 6th of Geo. IV. cap. 16, "debts due or to be due to the bankrupt, wheresoever the same may be found or known," are assigned, and such "assignment shall vest the property, right, and interest" in such debts in such assignees, as fully as if the assurance whereby they are secured had been made to such assignees"; and, "such assignees shall have the like remedy to recover the same in their own name as the bankrupt himself might have had." Well, then, the assignees clearly had a legal remedy to recover this sum of 500*l.*, or so much of it as should be considered applicable to the loss which had been sustained. It was a debt before the bankruptcy, and that debt is assigned to the assignees; and the assignees have a legal remedy for that to which the bankrupt is entitled.

On this consideration, that most learned Judge, Baron Parke, entirely changed the opinion he delivered when the case first came before him in the Court of Exchequer. He then agreed with the rest of the Judges of that Court when they delivered a unanimous judgment in favour of the plaintiff, having disregarded the circumstance of the penalty. But that circumstance having now been brought to his attention, he has entirely changed his opinion, as I find in the most express words in the opinion which he delivered to your Lordships; he says, "Therefore, in either view of the case, I now think that the judgment of the Court of Exchequer should be reversed, and the judgment of the Exchequer Chamber be affirmed"; that the judgment he himself originally concurred in should be reversed, and that the judgment reversing that should be affirmed. The opinion of that learned Baron, I should always receive * upon all occasions with the greatest respect, * 645 but more particularly when it is reversing the opinion which he himself once entertained.

The opinions of all the learned Judges are exceedingly valuable; but there are a few words of Mr. Justice Maule's which seem to me to put the case with great strength, and which show how far the principle upon which the learned Judges proceed may be carried. He says: "Although a right of action for not marrying or not curing, in breach of an agreement to marry or cure, would not generally pass to the assignees, I conceive that a right to a sum of money, whether ascertained or not, expressly

agreed to be paid in the event of failing to marry or to cure, would pass." My Lords, if for not marrying or for not curing, there being a penalty, and that penalty being forfeited and being recoverable before the bankruptcy, when it is clearly and exclusively personal to the bankrupt; — if, even in that case, the right of action would pass to the assignees, and would not remain to the bankrupt after his bankruptcy, it is quite clear that such right of action in the case your Lordships have to consider is transferred from the bankrupt to the assignees.

The 8 & 9 Wm. III. although it prevents the party recovering, as he might have done at Common Law, the whole of the penalty, does not at all prevent that part of the penalty which is recovered being considered in the nature of a debt; and so much is it a debt that an action of debt might be maintained for it. Instead of an action of assumpsit upon damages, an action of debt might have been maintained, and there would have been judgment for the amount of the debt.

* 646 Under these circumstances, my Lords, I have no * hesitation at all in concurring with the motion that the judgment of the Exchequer Chamber, reversing the judgment of the Court of Exchequer, should be affirmed.

LORD BROUGHAM. — In the case of *Porter v. Vorley*,¹ there are nominal damages where there was no penalty at all. I consider *Porter v. Vorley* to carry the law further than it is at all necessary for us to go in this case; because there, although there was no penalty whatever, I think they must have considered the nominal damages as in the nature of a debt.

Judgment was then given for the defendants in error, with costs.

¹ 9 Bingham, 93.

1850. August 5, 6, 9.

In the Matter of the JOINT STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849, and of the WOLVERHAMPTON, CHESTER, AND BIRKENHEAD JUNCTION RAILWAY COMPANY.¹

HENRY JAMES NORRIS, Official Manager of the said } *Appellant.*
Company, }

JOHN MORFORD COTTLE, *Respondent.*

Joint Stock Companies. Winding-up Acts. Provisional Committee. Contributory.

The mere fact of a person being a member of the provisional committee of a joint stock company does not make him liable as a "contributory" within the Winding-up Acts.

C. consented to have his name inserted in the list of provisional committee-men of a proposed railway company, which was provisionally registered; and the name was accordingly inserted and advertised; he did not accept or apply for shares, or attend any meeting of the committee. The undertaking was afterwards abandoned:—

Held, that C. incurred no liability to contribute towards payment of the debts of the company, and was not a "contributory" within the Winding-up Acts, 1848 and 1849.²

In the year 1845 a company was formed, and provisionally registered under the above name, for making a railway between Birmingham and Birkenhead, with a proposed capital of 1,000,000*l.*, to be raised by the creation of 50,000 shares, of 20*l.* each. Plans and sections, with books of reference, were prepared, and deposited at various offices, in conformity with the standing Orders of Parliament, at an expense which, * together with the charges * 648 of the several agents and others employed upon the business of the company, exceeded the sum of 12,000*l.*

¹ This, and the case which next follows, are reported out of their turn, on account of the urgent demand for them in the Masters' Offices. For the same reason the hearing of them was advanced by the House of Lords at the end of the session, with consent of the parties, Lord Brougham, the only law lord then in town, consenting to sit *de die in diem*, in order to dispose of them before the prorogation.

² See *Hutton v. Thompson*, 3 House of Lords Cases, 61, 174, 181, 184; *Bright v. Hutton*, 3 House of Lords Cases, 341.

Five gentlemen, named Samuel Harris, Thomas Upfill, Robert Wrightson, Thomas Harris, and Edward Cooper, paid from 420*l.* to 500*l.* each towards the expenses of attempting to carry into effect the objects of the said company, and they were respectively sued for debts due and owing on behalf of the company. No parliamentary contract or subscribers' agreement was ever entered into or prepared. The company ceased in January, 1846, and the undertaking was abandoned.

In October, 1849, the said Haines, Upfill, Wrightson, Harris, and Cooper presented their petition to the Lord Chancellor, praying that the company might be absolutely dissolved and wound up under the provisions of the Joint Stock Companies Winding-up Acts, 1848 and 1849, and that it might be referred to one of the Masters of the Court to wind up the affairs of the company under the said Acts. The necessary advertisements having been published in the London Gazette and in London and local newspapers, according to the provisions in the said Acts contained, and the said petition having been duly served, and supported by evidence according to the requisitions of the same Acts, the petition came on to be heard on the third day of November, 1849, before the Vice-Chancellor of England, when an order was made in the terms of the prayer of the petition.

William Brougham, Esq., the Master to whom the order was referred, appointed Henry James Norris official manager of the company under the provisions of the said Acts; and having
 * 649 made the * necessary inquiries, he, on the 22d of March, 1850, made his certificate as follows:—

“In the Matter of the Joint Stock Companies Winding-up Acts, 1848 and 1849, and of the Wolverhampton, Chester, and Birkenhead Junction Railway Company.

“I, William Brougham, Esq., the Master, &c. charged with the winding up of this company, do, at the request of the official manager, &c. hereby certify that he has made out and left in my office a list of contributories of the said company, as required by the said Acts, and that I have proceeded to settle the said list as required by the said Acts, and that the name of J. M. Cottle, of Leamington, is inserted therein in the character of a provisional committee-man; and I certify that I have been attended by the respective counsel and solicitors for the official manager and the said J. M. Cottle, and after hearing what was alleged by them, and upon reading, by the consent of the parties, the two letters hereinafter referred to, marked A and B respectively, and an entry in the minute book of the said company, dated October 10th, 1845, and it having been admitted before me

that on the 26th September, 1845, the said J. M. Cottle, by the said letter marked A, allowed his name to be on the provisional committee of the said company, and that the said J. M. Cottle was advertised as a provisional committee-man, but that he did not apply for or accept any shares in the said company, and that he attended no meeting and did no act; and that by the minute of the 10th October, 1845, every provisional committee-man was to be entitled to one hundred shares, but was to hold twenty-five shares to qualify him for his office, and that a letter in the form of letter marked B, allotting him twenty-five shares was sent to him, but that the said J. M. Cottle never took the said twenty-five shares, or any share or shares, I have thought fit to exclude and have excluded the said J. M. Cottle from the said list.

“W. BROUGHAM.”

LETTER A.

“LEAMINGTON, September 26, 1845.

“Sir,—I have received from Messrs. Brown and Clarke of Coventry the prospectus of the Wolverhampton and Birkenhead * Railway. I shall * 650 have no objection to comply with your request, and will thank you to insert my name, and also that of my friend, Mr. Hyde Clarke. The latter gentleman's name will be of consequence to you, as having considerable property in Cheshire, and being locally interested. Your obedient servant,

“J. M. COTTLE.

“Director of the Coventry, Nuneaton, Birmingham, and Leicester and Direct Western Railways.

“Edward Hyde Clarke, Esq., of Clarendon Square, Leamington, and Hyde Hall, Cheshire, director of the South Midland Railway.”

LETTER B.

“*Wolverhampton, Chester, and Birkenhead Junction Railway Company,*

(Provisionally registered pursuant to 7 & 8 Vict. c. 110.)

Capital 1,000,000*l.* in 50,000 shares of 20*l.* each.

Deposit 2*l.* 2*s.* per share.

Allotment No. 126 G.	25 Shares.	Deposit 52 <i>l.</i> 10 <i>s.</i>
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“BIRMINGHAM, 20th November, 1845.

“Sir,—I am directed to inform you that the committee of management have, in compliance with your application, allotted to you twenty-five shares in this undertaking, and that the deposit of 2*l.* 2*s.* per share, amounting to the sum of 52*l.* 10*s.*, must be paid to one of the under-mentioned bankers, who, upon the receipt thereof, will sign the voucher at the foot of this letter.

“This letter, with the banker's receipt, must be exchanged for scrip certificates, which will be granted upon your executing the subscriber's agreement and parliamentary contract, without which no person will be recognised as a subscriber, or be entitled to any interest in the undertaking.

“I am, sir, your obedient servant,

“JOHN SMITH, Solicitor.

CHARLES W. JACKSON, Sec. *pro tem.*”

Then followed the names and styles of the bankers, and the form of receipt that was to be given to the party on paying the said deposit.

* 651 * The official manager, with the consent of J. M. Cottle, appealed from the Master's certificate, and the appeal was heard before the Vice-Chancellor of England, on the 26th day of April, 1850, when it was ordered that the decision of the Master should be reversed, and that the name of J. M. Cottle should be included in the list of contributories.

J. M. Cottle then appealed against the last-mentioned order, and the Lords Commissioners for the custody of the Great Seal, who heard that appeal, by their order, made on the 15th day of July, 1850, discharged the Vice-Chancellor's order, and directed that the costs of J. M. Cottle should be paid by the official manager.

This appeal was brought against the order of the Lords Commissioners.

Mr. Bethell and *Mr. Glasse* for the appellant : —

Cottle's name having been, with his consent, inserted in the list of the provisional committee-men, it cannot be denied that he was a member of the association, and he was therefore a "contributory" within the terms and meaning of the Winding-up Acts.¹ The interpretation clause (section 3), in the first of those Acts, thus defines the word "contributory": it "shall include every member of a company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof." It is not necessary here to contend that these Acts create any new liability. The early decisions on these questions carried the liability of committee-men to a great extent. In *Barnett v. Lambert*,² in 1846, the Court of Exchequer held a

* 652 provisional committee-man liable * for payment of necessities supplied to the committee on an order from the secretary, without the defendant's knowledge, and although he had, in consenting to have his name put on the committee, contracted for a liability limited to the amount of his shares, and did no act on the committee beyond attending one of the meetings.

¹ 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108.

² 15 Meeson & Welsby, 489.

The principle of the decision was, that by consenting to become a member of the provisional committee, the defendant gave the officer of that committee authority to pledge his credit for such things as were necessary for the working of the committee. That principle, however, was afterwards qualified by the same Court in the cases of *Reynell v. Lewis*,¹ and *Wyld v. Hopkins*,¹ in which it was held that the mere fact of a person's consenting to be a member of a provisional committee of a projected railway company amounted to no more than a promise to act with the other members, for the purpose of carrying the scheme into effect; that the law would not, from such consent, imply an authority to the other members, or to the solicitor of the committee, to make contracts for the party, but still his liability would be a question for a jury in an action that might be brought against him as such member. The Chief Baron, in giving the judgment of the Court, after stating the principles of the decision, and that the agreement to become a provisional committee-man meant only "an agreement to act on the provisional committee in carrying into effect the preliminary arrangements for petitioning Parliament for a bill, and so to promote the scheme," further says, "but there are other cases in which the question does not assume so simple a form; and where there is evidence * that the defendant * 653 has not only consented to be a provisional committee-man, but has authorised his name to be inserted in a prospectus, not generally, but a particular prospectus, in which in some cases certain persons are described as the acting committee, in others solicitors are named, or engineers, or secretary. If such prospectus had been so publicly circulated with the defendant's consent that the jury would presume that the plaintiff knew of it, or if the plaintiff has had it shown to him at or before the time of making the contract, and has in either case acted upon it in making the contract, the question is, what inference ought a reasonable man to draw from the contents of that paper? This must, of course, depend upon the terms of each particular prospectus." In the present case there was a prospectus circulated with Cottle's name and consent.

Mr. W. M. James, of counsel for the respondent, objected to any reference being made to the prospectus; it was not before the Master, and he did not refer to it in his certificate. The Vice-

¹ 15 Meeson & Welsby, 517.

Chancellor and the Lords Commissioners had no prospectus before them. It was important that the Court of ultimate appeal should not admit any document to be referred to that was not before the Court below.

The Appellant's Counsel. — The prospectus had been before the Master, and so it would appear by the production of his notes. He states in his certificate, among other admissions, that the said J. M. Cottle was “*advertised as a provisional committee-man*”; — advertised, of course, in a prospectus. Cottle himself in his letter, set forth in the Master’s certificate, says, he had received the prospectus of the railway, and adds, “I will thank you to * 654 insert my name.” But whether * the prospectus was or was not before the Master, it was admissible here.

LORD BROUGHAM. — We, sometimes here, and often in the Privy Council, allow documents to be read, though they are not set out in the printed cases, nor referred to in the decree by the Court below. Probably the learned counsel for the respondent will, when their turn comes, show why we should not look at this prospectus.

The appellant’s counsel then, resuming the argument, said there were numerous cases at law in which it was held that individual members of an association, as a club for instance, were not liable for necessities furnished to the club, but that the liability attached on each member of the committee, by the mere fact of his becoming a member; *Fleming v. Hector*,¹ *Todd v. Emly*.²

But though Mr. Cottle, as provisional committee-man merely, may not be liable at law, or in equity either, to contribute to the payment of all the debts, liabilities, and losses of the association, he is clearly liable, in common sense and equity, to contribute his share to the payment of such debts and liabilities as were incurred by the provisional committee for the purpose of carrying into effect the objects for which it is said that committee was formed. He could not but foresee when he requested his name to be inserted in the prospectus, that in effecting the purposes for which the provisional committee was formed, some expense must be incurred. He, therefore, was bound to contribute something, the amount or proportion of his contribution being left to be * 655 settled by the Master. That proposition * is established by the judgment of the Lords Commissioners in this case;

¹ 2 Meeson & Welsby, 172.

² 8 Meeson & Welsby, 505.

although the same judgment in other respects is founded on a fallacy, which is manifest on the perusal of it. They said they dissented from the Vice-Chancellor's views of the law, on the ground that the cases of *Reynell v. Lewis*, and *Wyld v. Hopkins*, "established conclusively, that at law a person, by authorising his name to be placed on the provisional committee, gave no authority to any other member of the committee to enter into any contract whatever.¹ But those cases did not lay down any such principle. The actions in them were brought for an *entire* debt against one committee-man. All that is sought against Cottle is a contribution of a rateable share of the expenses. He admits his name was, by his desire, put on the provisional committee, without condition or limit, and that it was advertised. Suppose two or more persons join in any undertaking, and one of them orders goods for the undertaking, from a tradesman who knows from an advertisement that the two are so joined; although he does not, at the time, see the absent person, is not the credit given to him as well as to the person who is present? And is he not equally liable to contribute to the payment? The judgment of the Lords Commissioners, however, asserts the contrary. Suppose, again, the case of a dormant partner, although not liable to the world, because the world knows nothing of him, is he not liable to his partners for his share of expenses, as he is entitled to his share of profits? The definition of this word "contributory," in the Winding-up Act of 1848, is, that it "shall include every member of a company." * What can it mean but that such member is to * 656 *contribute* towards payment of debts and expenses? That must have been the view Lord Cottenham took in *Besley's Case*, although he found other grounds for holding him to be a contributory. "The only question,"² his Lordship says, "is, whether this gentleman has or has not rendered himself liable as a contributory to any part of the expenses incurred in this association, commencing with a provisional committee, &c. The facts that appear before me are, that Mr. Besley was originally ostensibly a member of this association, and that he agreed to his name being put down as a member of the provisional committee, for the purpose of institut-

¹ Read from MSS., since reported, 2 Macnaghten & Gordon, 185; and 2 Hall & Twells, 382.

² The judgment was read from a copy of a short-hand writer's notes; the case has since been reported in 2 Macnaghten & Gordon, 176, 182; and 2 Hall & Twells, 375.

ing the company." Having stated the other facts, his Lordship says, "the provisional committee appoint a committee of management, and expenses which are incidental to the commencement of such proceedings, are necessarily incurred. Other expenses arise: Mr. Besley does remain a provisional committee-man. It is not necessary to consider whether that mere fact would make him liable to any body. The case does not require any observation on that part of it, because there is so much more as to render it unnecessary to consider what the effect of that would be." His Lordship states the other circumstances, and says: "But then comes this fact: it is by your name remaining, coupled with the fact of your knowing it, that your liability arises, and you act on that liability, and pay." "All the facts show, that he considered that he was so far connected with the company as to render himself liable, to some extent, to pay. Looking at the words of the Act, I think he falls within the description of the Act, and that the Master was right in including him in the list." It is no forced interpretation of that judgment to say, that it not only does not admit of the construction put upon it by the Lords Commissioners, but that it is all but conclusive of Cottle's liability in this case. There were several other decisions involving the principle here contended for, as *Ex parte Hollinsworth*¹ and *Ex parte Cooke*,² before Vice-Chancellor Knight Bruce; *Ex parte Morgan*,³ a decision by Lord Cottenham; and also a case of *Lefroy v. Gore*,⁴ decided by Sir Edward Sugden, in Ireland.

Mr. Rolt and *Mr. W. M. James* for the respondent: —

It appears that this appeal is not only against *Cottle's Case*, but also against the numerous cases decided on the same principle in the Courts of Exchequer, King's Bench, and Common Pleas, which have been referred to; there is not one expression affecting the present case in the judgment in *Besley's Case*. The argument for the appellant comes to this, that there is here a legal liability; but that is met at once by the decisions at law; and there is nothing further to answer. If, as sometimes happens, any argument is reserved for the reply, the House will not, of course, prevent an answer, but as yet there is nothing to answer.

¹ 3 De Gex & Smale, 7.

⁴ 1 Jones & La Touche, 571.

² 3 De Gex & Smale, 148.

³ 1 Hall & Twells, 320; 1 Macnaghten & Gordon, 225.

With respect to the prospectus, if any reference to that were to be here allowed, the rules of evidence would be violated, and great injustice might probably * be done. Cottle's * 658 letter, consenting to have his name put upon the provisional committee, is the only document that affects him. The prospectus, which is said to have been before the Master, but of which the Master's certificate makes no mention, could not be the same which is mentioned in Cottle's letter, for his name was not in that prospectus. Let that be produced; probably, if returned by Cottle, he accompanied it with some condition that he should not be subject to any expense.

The question is narrowed to this one point, that Mr. Cottle allowed his name to be put on the provisional committee; he attended no meeting of the committee; applied for no shares; accepted none, though some were allotted to him; did no act whatsoever in furtherance of the scheme. It was strange that while the appellant attempted to import the prospectus into the argument, he omitted from his case the minute of the 10th of October, 1845, which is mentioned in the Master's certificate as being before him. That would, if produced, show that Cottle never applied for shares, although the secretary's letter, printed in the appellant's case, assumed that he did apply. There is no allegation that he paid any deposit, non-payment of which is equivalent to refusal to accept shares. No inference of acceptance can be drawn from the respondent's omitting to answer the secretary's letter. In the cases that have been referred to, *Ex parte Hollinsworth*, *Ex parte Cooke*, and *Ex parte Morgan*, deposits were paid, and by that and other circumstances they were distinguishable from this case.

It is clear that in this case there is no liability at law; if not, there is no liability in equity: the former is the measure of the latter. The law in these matters * was vague until it * 659 came to be settled by the two cases of *Reynell v. Lewis* and *Wyld v. Hopkins*,¹ and this case falls completely within them. The judgment of the Lords Commissioners in this case, as delivered by Baron Rolfe, is perfectly conclusive. In the case of *Lefroy v. Gore*,² Sir Edward Sugden says, "I agree that unless Mr. V. could have maintained an action against this defendant, the plaintiff here has no right to call on him for contribution,"—thus making the liability at law the test of liability to contribution.

¹ 15 Meeson & Welsby, 517.

² 1 Jones & La Touche, at p. 581.

Except the case of *Barnett v. Lambert*,¹ which bound no one but the defendant there, the cases at law, though differing in their circumstances, were quite consistent with the principles laid down in *Reynell v. Lewis* and *Wyld v. Hopkins*, as *Barker v. Stead* in the Common Pleas,² *Bailey v. Macaulay* in the Queen's Bench,³ *Flemyng v. Hector*,⁴ *Todd v. Emly*,⁵ *Wood v. The Duke of Argyll*,⁶ and *Williams v. Piggott*,⁷ in the last of which Baron Parke says: "I cannot help observing that unless something more appears than that there is a managing committee appointed by a provisional committee, the provisional committee never dream that by such appointment they render themselves liable for all the acts of the managing committee."

In *Ex parte Roberts*, decided with *Cottle's Case*,⁸ the Lords Commissioners say that, although it was an additional feature in *Roberts's Case*, that he attended meetings of the provisional committee, "this makes no difference in principle. The question in every case is, not what meetings has a committee-man attended, * 660 tended, * but what acts has he authorised to be done." "It is perfectly settled at law that no one present at such a meeting is bound by any resolution to which he does not expressly or impliedly consent." If a provisional committee-man, present at a meeting, be not bound, it is clear that an absent committee-man is not bound. There is no partnership in these cases, and the argument for the appellant gains no strength from the imaginary cases that were put by his counsel.

Mr. Bethell in reply. — The object of an order to wind up the affairs of a company is to pay the debts of the company, or divide their assets, if they have any, amongst them. Suppose a company to consist of five provisional committee-men only; they form the company or association. If the provisional committee-men be not members liable to debts, what is the winding-up order in such a case made for? The very announcement to the world of a provisional committee, expresses that some expenses must be incurred. Did not Mr. Cottle, by allowing the announcement of his name in the prospectus advertised to the world, declare expressly that he

¹ 15 Meeson & Welsby, 489.

² 3 C. B. 946.

³ 19 Law Journal N. S. Q. B. 73.

⁴ 2 Meeson & Welsby, 172.

⁵ 8 Meeson & Welsby, 505.

⁶ 6 Manning & Granger, 928.

⁷ 2 Exch. Rep. at p. 204.

⁸ Vide supra, 655.

was a member of the company? There are expenses to be incurred at every step. The standing orders of the Houses of Parliament are to be complied with. Expenses must be incurred in doing the acts necessary to obtain the Act for incorporating the company, and for them each member is liable, whether at law or not. Suppose a man, being a partner in a brewery, or other established trade, gives by his will all his property to his executors and trustees, directing them to continue in the business, they, by accepting the executorship, become partners; and then if the firm falls into difficulties, are these executors, having in pursuance of the directions of the will put themselves in * a * 661 position of equitable liability, not to have contribution from the *cestuis que trust* under the will?

LORD BROUGHAM. — In this case there is no partnership, and it is of no use to put cases of partnership for illustration.

Mr. Bethell. — Of course; the question could not arise if there was a partnership. But suppose three persons agree in a joint adventure at sea, one agreeing to find the ship, another to find the cargo, and the third to find the stores, and one of them purchases a ship, but the others do not supply stores or cargo, and the adventure fails, and the owner of the ship brings an action against the purchaser of the ship, and recovers the price of the ship; — are not the other two, who did not find cargo or stores, liable in equity to contribute their respective shares, in discharge of the sum so recovered? It would be easy to suppose cases in which such equitable liability would attach to a party, though he took no active part in promoting the joint concern. There are, in this case, as it were, two contracts, the one with the public, the other between the members of the committee; and in respect of the latter, each member has a right to call on the others for contribution. The liability of the members to each other is never touched on in the argument for the respondent.

LORD BROUGHAM. — This case, my Lords, is one of the greatest possible importance, and I am withheld only by one consideration from again expressing my anxiety at having the weight of the decision cast substantially upon me, without having the assistance of the learned Judges either of law or of equity.

The course, however, which I now propose to your

* Lordships to pursue is, not to call for the assistance of * 662

the learned Judges, for the reasons which I will shortly state to you. If your Lordships were to have the assistance of the learned Judges, of course you must have either the Judges of the Court of Chancery, or the common law Judges, or both. There is nothing whatever to require a special Act to enable this House to call for the assistance of the Judges of the Court of Chancery. That is the opinion of Lord Lyndhurst, and Lord Cottenham; and it is very clear in my mind that though we have sometimes collaterally put it in bills, which have never received the sanction of the legislature, yet it is not essential. But suppose we desired to have the assistance of the learned Judges of the Courts below, how would the matter stand? The Master of the Rolls, a late Lord Commissioner, and the Vice-Chancellor of England, also a Lord Commissioner, are two of the Judges whose decisions are in conflict by the appeal before us; one has decided one way, the other has decided the other way. They would not form a very satisfactory body of assessors, to whom this appeal might be referred. Then there is the Vice-Chancellor Knight Bruce,—for whom I have the greatest respect as a most able, learned, and indefatigable Judge, whose services to the public and to the suitors in the Court of Chancery it is impossible, in my opinion, to estimate too highly, especially during the lamented illness of his learned brother Sir James Wigram,—he is, to a certain degree, involved in this, because the next case we are to hear is an appeal from himself. He therefore becomes no longer so useful a member of the body of assessors to the House, as he would have been but for that circumstance. That consideration, *663 therefore, disposes of all the Equity *Judges, because Vice-Chancellor Wigram is unfortunately unable to attend,—and indeed my most learned and excellent friend, the Vice-Chancellor of England, I lament to say, is also, from his continued indisposition, unable to attend; so that we can have no aid in these cases from the learned Judges of the Court of Chancery.

Then how is it with respect to the Judges of the Courts of Common Law? They are estopped in much the same way. The Judges of the Court of Exchequer have wavered a little, perhaps more in semblance than in substance, but at all events they are supposed to have wavered in their opinion. They decided the three cases, which have been so often commented upon at the bar,

one being the leading case cited against the appellant, and on behalf of the respondent, but though they differ, they endeavour to show,—as men do in arguing upon and applying cases or resisting the application of cases,—that there are no cases supporting a contrary conclusion. That Court also includes Baron Rolfe, who was one of the Lords Commissioners who decided the present case, and to him therefore the former observation applies.

Then as to the Court of Queen's Bench: that Court is said to have adopted every tittle of the argument in the judgment in Banc of the Court of Exchequer. In another of the cases cited before us, the Court of Common Pleas is involved. So that, taking all those together, I hardly ever knew a case in which the assistance of the learned Judges, as assessors to this House, would be less fruitful than in this case now before your Lordships; for which reason I am clearly of opinion that the more useful course for the House to take, will be to deal with the case without that assistance. That *being my opinion, I have no * 664 hesitation in advising your Lordships not to call for the assistance of those learned Judges, unless any thing shall occur in the course of the argument upon the next case to alter the opinion which I now entertain.

I have now only to beg your Lordships to postpone the final dealing with this case till after the other has been heard; and I do that, not altogether on account of any connection between them, though that is adminicular to the observations I have made and to the resolution which I ask your Lordships to come to, but because my constant course has been, in those long protracted sittings, not to move the judgment of the House till time was given after the argument, by the intervention of some days, to look into the whole case. That I have lately done in every case but one, a case in which there was no doubt whatever.

August 9.

LORD BROUGHAM. — The great importance of this case renders it imperatively the duty of the Supreme Court of Appeal to examine minutely the grounds of the order under review, and to consider at large the authorities which bear upon the question, as well as the principles with which it is connected, and which must govern our decision.

The question, and the only question before us, is, whether or not a person, by becoming a member of a Provisional Committee in a railway or other company, not yet completely formed, but in course of being formed, — certainly not yet in active operation, — makes himself liable to the other members of the Provisional Committee, or to any of the officers of the association in respect of the dealings between those other members, or those officers and

* 665 third parties, strangers to * the association. Mr. Cottle's name was excluded from the list of contributories by the Master, acting under the winding-up order made under the provisions of the two Acts, 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108. The Vice-Chancellor, reversing the Master's finding, restored Mr. Cottle's name to the list. The Lords Commissioners of the Great Seal, upon appeal, reversed the order of his Honour, and restored that of the Master, excluding Mr. Cottle from the list.

I say the only question here relates to the effect of a party being, with his consent, a provisional committee-man ; for although in the argument a good deal was said about the prospectus, we have not that document before us, — nor had the Master, — and if we had, it would not at all change the case or alter Mr. Cottle's position in relation to the company. I do not say that a prospectus might not have figured, on which much might turn perhaps, but it is not the case here. Therefore the question is quite general, and in that consists its importance. It relates to the effect of a person allowing himself to be named one of the provisional committee in such a concern, without any thing more.

Now, first, let us consider what is the legal liability which this allowed nomination imposes, for if it makes the party liable at all to those who contract with the committee, past all doubt, he is a contributory, within the third section of the first Act. 11 & 12 Vict. c. 45.

It appears that considerable discrepancies existed between the decisions of the Court of Exchequer on this point in the year 1846, and that the Court changed its view of the matter entirely within a very short period of time. *Barnett v. Lambert*,¹ was * 666 decided in May, * and the Court in that case held the committee-man liable. This was the principle on which the

¹ 15 Meeson & Welsby, 489.

decision rested; for although it was a fact in the case that the defendant had attended and acted as a provisional committee-man, no reference whatever is made to this circumstance in the judgment, which proceeds entirely on this; that a person who consents to be a provisional committee-man is assumed to pledge his credit for things necessary to the concern. In the month of November in the same year, the cases of *Reynell v. Lewis*,¹ and *Wyld v. Hopkins*,¹ were decided by the same Court, and the same Judges, with the concurrence of their learned brother Baron Parke, who had not been present before, unanimously held the committee-man not liable for the acts of his fellows, the law not implying from his mere consent to be a provisional committee-man either an authority from him to make contracts by those other committee-men, or to the solicitor to make contracts on behalf of the committee, but merely a promise to act with those others to carry the scheme into effect. The publication of the prospectus with his name was held to make no difference. In these cases, *Barnett v. Lambert* was cited in argument for the plaintiff, but it is remarkable that no reference is made to it in the judgment. It would have been more satisfactory had the learned Judges admitted at once that they erred in deciding that case, to which their decisions in the two latter are wholly opposed. But this silence is much more to be commended than the practice sometimes followed in cases of erroneous judgments afterwards departed from; I mean that of endeavouring to find out special circumstances to distinguish * the * 667 several cases, for the purpose of making it appear that the decisions are reconcilable. Much bad law is thus occasionally introduced, and not soon got rid of. Parties are encouraged to try points which ought to be considered desperate, and the Courts which consult those conflicting cases are not seldom misled in search after authority. No Judge ought to be ashamed, after erring, to acknowledge his error; still less has a Court any reason for so misplaced a shame, so unseemly a reluctance, to admit that the dispensers of justice are subject to the common lot of erring humanity. The rule laid down in those two later cases, by the Court of Exchequer, has since been followed by the unanimous concurrence of both the other Courts of Common Law. The Court of Common Pleas, in 1847, in *Barker v. Stead*;² and the Court of

¹ 15 Meeson & Welsby, 517.² 3 C. B. 946.

Queen's Bench, in *Bailey v. Bracebridge*,¹ *Bailey v. Haines*,¹ *Bailey v. Macaulay*,¹ and in *Wilson v. Holden*,² in 1849, entirely adopt the cases of *Reynell v. Lewis* and *Wyld v. Hopkins* in the Court of Exchequer, and Lord Chief Justice Denman says, in delivering the judgment of the whole Court in the cases before it, that there is not a single passage in those judgments of the Court of Exchequer from which the Judges of the Queen's Bench dissent.³

We have thus the clear and unhesitating opinion of all the Judges of the Common Law Courts against the liability at law ; and we have now to see how far that has been held on the other side of Westminster Hall, as either doubtful in a legal view, *668 or insufficient to negative * the liability of the provisional committee-man in equity and on equitable views. With this purpose we are referred to Lord Cottenham's decision in *Besley's Case*.⁴ But on a full consideration of what his Lordship said when he gave his judgment, I must deny that he intended either to depart from the doctrine laid down on the other side of the Hall in regard to the legal liability, or to state that the mere fact of consenting to be a provisional committee-man imposed an equitable responsibility. In the course of the argument he certainly evinced a leaning towards that opinion ; but this was early in the discussion, and he prefaces his judgment by stating that the case does not require him to decide whether or not the mere fact of the defendant remaining on the provisional committee, after expenses are necessarily incurred, would, were there nothing more, make him liable to any body ; for, says his Lordship, " the case does not require any observation upon that part of it, because there is so much more as to make it unnecessary to consider that." These circumstances, upon which the decision turns, are his attending meetings when a managing committee is appointed, which reports on expenses incurred ; his joining in an order for liquidating those expenses ; his paying his share towards that expenditure, and his still consenting to allow his name to remain on the committee. His Lordship's view is that his name was known by him to continue there ; that his liability arose from thence, and that he paid his share, acting on that liability ; — by which, I take it, his Lordship means to imply an admission, as it were, on the provisional committee-man's part, of his liability.

¹ 19 Law Journal N. S. Q. B. 73. ² 19 Law Journal N. S. Q. B. at p. 81.

³ 19 Law Journal N. S. Q. B. 73. ⁴ Vide ante note f, p. 656.

* It is quite as unnecessary, in the present case, to con- * 669
sider whether or not his Lordship's opinion respecting those
special circumstances is well founded, as it was for him in that
case to consider the consequences of a mere consent to be on the
provisional committee ; because the circumstances of payment, or
of joining in any order to a managing committee, are here wholly
wanting. I may, however, observe that the mere fact of payment,
on which the decision in *Besley's Case* mainly turns, seems not
sufficient of itself to raise either a legal or an equitable liability.
A man might submit to pay a certain sum, and refuse to pay more ;
he might submit for peace sake, and also to avoid trouble and con-
tention ; he might even admit he was properly charged to a certain
amount, in consequence of his having concurred in an order
respecting a certain small expenditure, while he denied his liability
ultra, and denied his general liability altogether. But into this it
is unnecessary to enter, because the question now before us is
relieved from the embarrassment of all such special circumstances,
— to which I must add that I have consulted with my noble and
learned friend who gave that judgment, and I find two things from
him distinctly : first of all, that he did not consider that case to
be inconsistent at all with the non-liability at law laid down in the
two Exchequer cases, and subsequently in the Common Pleas and
Queen's Bench cases, for that he decided it upon circumstances
which did not occur in those cases ; and, secondly, that he utterly
dissents, as I do, from the doctrine of the legal liability being no
test or measure of the equitable liability, or the general liability
upon the whole, so to speak ; and why do I say this ? Because
his Lordship expressly says : " Had those special circum-
stances occurred * in the cases at law, and had those cases * 670
at law decided against the liability at law, I should not so
have decided *Besley's Case*." I reckon that to be a most important
circumstance, and therefore I felt myself authorised, and indeed
bound, to state it openly as the opinion of his Lordship. I have
been favoured with his Lordship's own note upon the subject.
Therefore, my Lords, no aid whatever is derived from *Besley's
Case*, in any way in which it can be regarded, — to which it is
fit I should add that the case itself is appealed from, and it is
appointed to be reheard by the Lord Chancellor, who has since
succeeded Lord Cottenham.

But the appellant contends that a party joining others in an

adventure or other concern, may become liable in equity to them, though not liable at law either to them or to third parties. Here we must distinguish as to the capacity in which such a liability is alleged to be incurred. In the present case there is no partnership. All authorities hold that such an association is not a partnership; *Walstab v. Spottiswoode*¹ and *Reynell v. Lewis*,² so often referred to, lay this down in express terms. No such partnership is made between the provisional committee-men and the managing committee, nor is any such connection seriously contended for in the argument of counsel here. They rather put it as an implied authority of principal to agent, as an authority given to contract for the party, and to pledge his credit. But if so, there is no question of equitable, as distinguished from legal, liability; for if there is any such authority by implication, the principal is bound at law, and the exception so often referred to in the two Ex-
 * 671 chequer cases, that the provisional committee-man is * not liable unless he has authorised the committee or its servants to pledge his credit, either expressly or impliedly, points to no equitable liability, but to a liability strictly and rigorously legal.

It is difficult then to apprehend how the appellant can object to the doctrine laid down, in giving the judgment appealed against, that the legal liability of the party is the measure of his equitable liability. I can see no other measure; I can perceive no other ground of that equitable liability. The proposition is repeatedly urged that, a party may be bound in equity who is not bound in law;—no question he may, but this is a very unfruitful position, unless you show some equitable obligation in the case under consideration, the legal liability being clearly gone by force of the decided cases at law.

Much confusion is imported into the argument, by the reference to contributions, as a relief worked out by proceedings in Courts of Equity. But the case is this; a right to relief by way of contribution exists at law; but it is so cumbrous, and liable to so much difficulty in working it out, and the Courts of Law are so entirely incapable of dealing with many matters which are likely to occur in all such cases, that equity is resorted to for convenience; yet it is not only not easy, it is not possible to figure a case in which equity will give contribution, unless against one who was legally liable to that which the complaining party has

¹ 15 Meeson & Welsby, 501.² 15 Meeson & Welsby, 517.

been sued for, and has lost. Take the old writ of contribution, — *de contributione facienda*,¹ — as by one coparcener, against his companions in respect of expense incurred by suit or admission in the Lords' Court, or by tenants in common of a mill, which both are bound to repair, and one repairing it, when fallen to decay, has the writ * against his coparcener for his share * 672 of the expense. Here the writ expressly sets forth the common liability, and that because one has done the act, he may sue the other for his proportion to relieve him; Fitzherbert's *Natura Brevium*, p. 162. Nor can it make any difference whether the common liability is legal or equitable. If two jointly contract to do a thing, and one does it, he may have contribution against the other. Indeed were one sued in equity for specific performance, both must be made parties, but then both are liable; and if one does the thing without any suit, he has his relief against the other, in respect of both being liable; and equally liable. For observe, in this case there is a legal liability, inasmuch as each may be sued at law for breach of contract; for specific performance, no doubt, he cannot be sued at law, but for breach of contract he may. The case was ingeniously put in the argument here, of a joint or common adventure, as of a voyage in which one agrees to find the ship, another the cargo, and a third the stores, and the shipowner recovers the price of the ship against the one who purchased it; then, it is said, the others are liable for their share, unless each furnished his quota to the common adventure, the one the stores, the other the cargo. If they are so liable in respect of the price recovered by the shipowner, it can only be because they have made themselves liable to their companions by an express contract to pay unless they furnish their quota, or by an implied contract to the same effect, and thus they are legally liable for breach of that contract, or they may be compelled in equity to perform it.

In no view which I have been able to take of this case can I perceive the least ground on which an equity can be raised as between the provisional committee-man * and the rest of * 673 the committee or their officers, unconnected with and independently of the legal liability of that party, as having, either expressly or by implication, authorised his companions or their officers to pledge his credit with strangers. The law has been

¹ See *Bright v. Hutton*, 5 House of Lords Cases, at p. 351.

laid down by all the Courts, and it negatives any such authority, express or implied, in a case where no fact exists save only that of a consent to be on the provisional committee.

Therefore, my Lords, in my opinion the respondent is not a contributory within the Acts, and he ought not to be put on the list by the Master. The Lords Commissioners have accordingly, in my opinion, decided right in reversing the order of the Vice-Chancellor and directing the respondent's name to be expunged; and I therefore advise your Lordships that the judgment complained of should be affirmed, with costs.

It was accordingly "ordered and adjudged, that the appeal be dismissed, and that the order of the 15th of July, 1850, therein complained of, be affirmed; and that the appellant pay to the respondent the costs incurred in respect of the appeal, the amount thereof to be certified by the Clerk Assistant."

1850. August 6, 7, 9.

In the Matter of the JOINT STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849, and of the DIRECT BIRMINGHAM, OXFORD, READING, AND BRIGHTON RAILWAY COMPANY.

JAMES HUTTON, Official Manager, *Appellant*.

JAMES UPFILL, *Respondent*.

Joint Stock Companies. Winding-up Acts. Provisional Committee. Acceptance of Shares. Contributory.

If a person whose name is on the provisional committee of a Joint Stock Company, provisionally registered, "accept" shares in the company, although he does not pay the deposits, he is a contributory within the Winding-up Acts.

U.'s name was on the list of the provisional committee contained in a published prospectus of a Railway Company, provisionally registered, and in answer to a letter from the secretary, informing him that the committee of management had apportioned one hundred shares in the company to each provisional committee-man, and desiring to be informed whether he would take them; he wrote a letter saying, "I accept the one hundred shares allotted me." The secretary afterwards sent him a letter of allotment "not transferable," stating that the committee of management had allotted to him one hundred shares, and requesting him to pay the deposits thereon into one of the company's

Banks on or before a certain day, "or the allotment would be null and void."

U. paid no deposits, and did no other act in connection with the company.

The undertaking, having failed for want of capital, was abandoned: —

Held, that the first two letters formed a complete contract, exclusive of the third; and that U. was a contributory within the Winding-up Acts, 1848 and 1849.¹

In the year 1845 a company was formed for the purpose of constructing a railway from Birmingham to Oxford, and thence to Reading and Brighton, for the conveyance thereon of goods and passengers, and was provisionally registered, pursuant to the provisions of the Act 7 & 8 Vict. c. 110, by the above name. A prospectus was printed, and published, containing the names of divers persons, including the respondent, as * forming the * 675 provisional committee of the company; it also contained a statement of the objects of the company, and that the capital was to be 2,000,000*l.*, to be raised by the issue of 80,000 shares of 25*l.* each.

A meeting of the company was held the 8th October, at which there were present twenty-four members, but not the respondent; and a resolution was passed to the effect that fourteen gentlemen (who were named, but did not include the respondent) be appointed a committee of management. A larger number was at the same time appointed to be on the provisional committee, and the respondent was named among them. Engineers and solicitors to the company were also appointed; and it was, among other things, resolved, "that until an Act of Parliament shall be obtained, the affairs of the company shall be under the control of the managing directors, to whom power is given to allot shares, and to apply the funds of the company in payment of all expenses incurred in its formation, and in the preparation of plans and sections to be submitted to Parliament."

On the next day a meeting of the managing committee was held, ten out of the fourteen attending, and it was, among other things, resolved, "that the provisional committee have one hundred shares each; that Messrs. Nias and Jones, the projectors of the company, be paid 2000*l.* for reimbursement of their expenses up to the issuing of the prospectus, provided the parliamentary deposits be paid; that they and the solicitors, and the secretary

¹ See *Hutton v. Thompson*, 3 House of Lords Cases, 161, 174, 181, 184, 192
Bright v. Hutton, 3 House of Lords Cases, 341.

(then appointed) and the managing committee have allotments of shares" (the amount was specified). At subsequent meetings of the managing committee it was resolved, that application be made to a London bank for a loan of 2000*l.*, until the deposits be paid.

*676 * On the 10th of October, the secretary of the company sent a circular letter to each member of the provisional committee, and amongst others to the respondent, informing him that one hundred shares in the company had been apportioned to each member of the provisional committee, and desiring to know whether he would accept the same, or any and what number thereof. The respondent, in reply, wrote to the secretary a letter on the 14th, saying, "I accept the one hundred shares allotted to me in the direct Birmingham, &c. Company.—James Uppill, P. C."

The committee of management allotted to the respondent one hundred shares, and on the 18th of October, 1845, the secretary sent him a letter, informing him that the said shares had been allotted to him, and requesting him "to pay the deposit of 2*l.* 12*s.* 6*d.* per share (263*l.* 10*s.*) into one of the banks undermentioned, on or before the 24th of October, 1845, or this allotment will be null and void," adding that this letter would be exchanged for scrip upon producing it, with the bankers' receipt, at the offices of the company, and executing the parliamentary contract and subscribers' agreement.

The respondent did not attend any meeting of the provisional committee, or committee of management, nor pay the deposit of 2*l.* 12*s.* 6*d.* per share, or any part of it, on the one hundred shares, nor execute the said contract or agreement.

Of 76,630 shares that were allotted, the deposits were paid on 4295 only; and it therefore becoming impossible to proceed with the undertaking, it was abandoned. The committee of management, collectively and individually, paid large sums of money on account of debts contracted by them in the prosecution of the undertaking, and other debts of the company still remained unpaid.

*677 * In December, 1849, an order was made by the Vice-Chancellor of England, on the petition of Stopford Thomas Jones, (who was one of the projectors of the company, and also of the committee of management,) for the dissolution and winding

up of the said company, under the Joint Stock Companies Winding-up Acts, 1848 and 1849.

William Brougham, Esq., the Master to whom the order was referred, appointed the appellant official manager of the company, pursuant to the provisions of the said Acts. The appellant, as such manager, made out from the books of the company a list of the contributories for the Master, and included the name of the respondent, "as a member of the provisional committee who has accepted his shares."

The Master, in settling the list, was attended by counsel for the appellant, and by his certificate, dated the 24th of July, 1850, he stated that the minute-book of the company, the said circular letter of the 10th of October from the secretary to the respondent, his letter of the 14th of October in answer to the secretary, the allotment-book of the company, the said letter of allotment of the 18th of October from the secretary to the respondent, having been produced and read before him, and also the *vivâ voce* examination of the secretary in reference to another case,—he had included the respondent in the list as a contributory in respect of one hundred shares of 25*l.* each.

Vice-Chancellor Knight Bruce, on hearing a motion made on the same day on behalf of the respondent, by way of appeal from the Master's certificate, ordered that the respondent's name should be excluded from the list of contributories, and that the appellant should pay the respondent's costs of attending before the Master, and of that application.

* That order was the subject of the present appeal.

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Mr. Bethell and *Mr. Roxburgh* for the appellant :—

This case differs in some respects from *Cottle's Case*. There is here a published prospectus, with a list of the provisional committee, in which appears the name of the respondent. There is also his answer to a letter from the secretary of the company, informing him that one hundred shares in the company were apportioned to each member of the provisional committee, and requesting to be informed whether he would take that or a less number. The respondent, by letter, answers that he accepts the one hundred shares allotted to him. These two letters constitute a complete contract, so that Mr. Upfill is not only a provisional committee-man, but has also an allotment of shares, and accepts them.

It may, however, be argued here as it was in the Court below, that another letter from the secretary imported new terms into the contract. In that letter dated the 18th of October, and headed, "Letter of allotment: not transferable," the secretary writes that the committee of management had allotted one hundred shares to the respondent, and he was directed to request him to pay the deposit of 2*l.* 12*s.* 6*d.* per share into one of the company's banks, "on or before the 24th of October, or this allotment will be null and void." The respondent contends that these terms introduced a condition into the former contract, and left to him an option to take the shares or not. The authority for that argument is the case of *Duke v. Andrews*,¹ which was an action of assumpsit for deposits on shares, for which the defendant had applied in the usual form, undertaking to accept so many or a less number, and *679 to pay the *deposits, &c. A letter of allotment of sixty shares was sent to him, headed "not transferable." The Court of Exchequer held that these words were part of the answer to the application for shares; that the application was absolute, and the acceptance of it was conditional. Baron Parke, giving the judgment of the Court, says: "We think there is no binding contract; the defendant makes an absolute proposal; but the acceptance in the letter of allotment is conditional; it contains a qualification that the contract is not to be transferable." That case is clearly distinguishable from this; for here the first proposal came from the committee, by allotting shares to the respondent; and there is an unqualified acceptance of them by the respondent. It is further to be observed, that the condition of "not transferable" is not annexed to the shares, but to the letter of allotment.

All the arguments and authorities which have been urged in *Cottle's Case* are applicable to Uphill's position of provisional committee-man. The cases at law against the liability of persons in that position were actions by third parties, not members of the companies, and are not applicable here, where the liability sought to be established is an equitable liability of one member of the committee to the other members to contribute towards payment of their common debts. In *Besley's Case*,² Lord Cottenham said "he incurred liability by permitting his name to appear as a provisional committee-man, there being a body elected by that committee who

¹ 5 Railway Cases, 496; 2 Exch. Rep. 290.

² Vide ante, note p. 656.

were incurring expenses necessarily incidental to the commencement of such proceedings, holding himself out as a member of that body, the provisional committee, under whose direction the managing *committee was acting." The cases *Ex parte Morgan*,¹ *Ex parte Lord Mansfield*,² and *Parbury's Case*,³ contrasted with the cases at law of *Fox v. Clifton*,⁴ *Pitchford v. Davis*,⁵ and *Wontner v. Shairp*,⁶ illustrate the distinction between liability at law and liability in equity. It appears that Parbury was held to be a contributory, though Wontner, in the same position, was declared entitled to receive back his deposits. The cases at law, being mostly actions brought by tradesmen and others, strangers to the companies, against members of the companies, were not applicable to the Winding-up Acts, the object of which was to settle the equities between the members of the companies themselves. This respondent, by becoming a member of the provisional committee, and further by accepting shares in this company, became a member of the company, and was therefore liable, within the provisions of the Winding-up Acts, to contribute proportionally towards payment of the debts and liabilities of the company. It is, upon these grounds, submitted that the Vice-Chancellor's order ought to be reversed. It was extremely desirable to have an early decision, as there were no less than 8000 cases in the Masters' offices, depending on the result of this case.

Mr. W. T. S. Daniel for the respondent. — The question in the appeal was of the greatest moment; there was certainly a great number of cases pending in the Masters' offices. Different Masters entertained different opinions, *and all were anx- *681
ious for a leading case. None of the parties whom he represented wished for delay; on the contrary, they all desired an early decision, and with that view these appeals were brought up by arrangement and consent, but they all desired that the decision should be most carefully considered; and as the House could not have the benefit of the presence of the Judges, he was instructed most respectfully to state that an application was intended to be made to request the Lord Chancellor to attend.

¹ 1 Hall & Twells, 320, and 1 Macnaghten & Gordon, 225.

² 1 Hall & Twells, 593, and 2 Macnaghten & Gordon, 57.

³ 3 DeGex & Smale, 43.

⁵ 5 Meeson & Welsby, 2.

⁶ 6 Bingham, 776.

⁴ 4 Railway Cases, 542.

LORD BROUGHAM said he had the greatest respect for his noble and learned friend, the Lord Chancellor. He had just taken his seat in the Court of Chancery, and was not yet much conversant with those cases. Were he, however, to attend, he would be here like any other peer. It was not proper that a suitor here should solicit the attendance of any peer. If the parties did not wish for delay, then their objection was that only one Law Lord was present. That was not new; for he himself, when he held the Great Seal, and also after resigning it, often was the only Law Lord present to hear appeals. That had happened frequently before his time; and it was well known that Lord Giffard was specially appointed in 1824 to hear appeals then in arrear, and Sir John Leach was appointed after him.

Mr. Daniel then proceeded: The argument used to establish Mr. Uphill's liability as a contributory under the Winding-up Acts is twofold. First, it is said that he is liable by the sole fact of his being a provisional committee-man, and on that point the argument is the same as in *Cottle's Case*; secondly, it is said his liability arises from the alleged acceptance of shares in the company. There is certainly a prospectus in which his name appears on the provisional committee; but there is no evidence that he
*682 ever saw it *or authorised the insertion of his name. In

Cottle's Case it was shown, by his own letter, that he consented to be put on the provisional committee. There is nothing to connect Mr. Uphill with the prospectus produced in this case, or with the contents of it. There is an extract from the minute-book of the proceedings of the company, on the 8th of October, with the names of the persons who were present; but the name of Uphill does not appear there. It appears that at that meeting a provisional committee and a committee of management were nominated, and Uphill's name is put on the former in his absence, and, it may be assumed, without his consent, as no evidence of consent is given. It appears also that, at the same meeting, a resolution was passed that until an Act of Parliament should be obtained, the affairs of the company should be under the control of the managing directors, to whom power was given to allot the shares, and to apply the funds of the company in payment of all the expenses incurred in its formation. No Act of Parliament was obtained, so that the committee of management had no power to incur debts, but were to pay all expenses out of the company's funds. [LORD BROUGHAM.

— How were the funds to be got ?] From deposits on shares, and until the deposits were paid, a loan was to be obtained from a London bank, to meet current expenses ; there was a resolution of the managing committee to that effect. That no debts and no personal liability were to be incurred ; but that all payments were to be made out of deposits, appears further from a resolution of the 9th of October, “ that the projectors, Messrs. Nias and Jones, be paid 2000*l.* for reimbursement of their expenses, &c. provided the parliamentary deposits be paid.” It was then also resolved, that the said projectors, the secretary, the solicitor, the provisional and managing * committees, should have allotments of * 683 shares ; and at a meeting on the 21st of October, Jones, one of the projectors, and now the petitioner for the winding-up of the company, was added to the committee of management. All the resolutions and proceedings of the company showed a manifest intention to discharge the provisional committee, and exempt them from all liability from the time that the committee of management was appointed.

The only question therefore is, whether the respondent's letter of acceptance of shares made him liable within the Winding-up Acts ? The acceptance of shares in answer to a circular does not imply “ taking shares.” The distinction is noticed by the Vice-Chancellor in *Bell v. Lord Mexborough*.¹ Mr. Upfill did not take any shares ; he did no act in relation to the project ; in no sense could he be made liable at law for any thing done by the company or its managers.

The proposition that there is an equitable liability, where there is no liability at law, is an assertion without authority. There is no such thing as equitable, distinct from legal, liability ; there may be a liability at law which equity only can enforce ; but equity does not create the liability. Baron Rolfe, in giving the judgment of the Lords Commissioners in *Cottle's Case*, — a judgment which is conclusive on the first part of this case, — says :² “ All that a person does by becoming a member of a provisional committee is to signify his approbation of the scheme, and to engage that he will concur with the others in such acts as he may approve of and think conducive to the objects in view. If, indeed, he expressly or impliedly give authority to any one or more of the committee to act for him, then whatever is done in pursuance of that

¹ 5 Railway Cases, at p. 162.

² Vide supra, note, p. 655.

* 684 authority is of course * obligatory on him." "But the result of the cases at law, to which we have been referred, is that the mere fact of becoming a member of a provisional committee gives no authority whatever to any one. It was indeed argued before us, that although a person by being on the provisional committee does not make himself liable to third persons for dealings between them and other members of the committee, yet that he does become liable as between himself and such other members, to contribute rateably in respect of their outlay. But this is an entire fallacy. The obligation to contribute is a legal obligation, and may be enforced by action at law, though often more conveniently in equity."

The contract in this case, if contract at all, was not closed by the respondent's letter of acceptance of shares. The secretary's subsequent letter was an essential part of the contract, affixing conditions to the allotment of shares intimated by his first letter, and thereby giving the respondent an option to take the shares or not. His choice of the latter alternative was, in the argument in some of those cases, assimilated to a covenant in a lease for payment of rents, and other acts, of the non-performance of which the lessee could not be allowed to take advantage, in order to put an end to the lease. There was no similitude, and therefore no parity of reasoning, between the two cases. The letter also stated that the allotment of shares was not transferable, a condition which would at law dissolve the contract, arising out of the previous letters; *Duke v. Andrews*.¹

The respondent did not take any notice of the secretary's second letter; he paid no deposits; signed no parliamentary or subscribers' contract; no one signed them, because the project was abandoned for want of deposits. If the respondent had * 685 paid the deposits, there * is no doubt that at law he might recover them back from the committee of management; *Walstab v. Spottiswoode*,² *Wontner v. Shairp*,³ *Bell v. Lord Mexborough*.⁴ How then could a Court of Equity, as Lord Cottenham said in *Bell v. Lord Mexborough*, compel him to contribute what a Court of Law would enable him to recover back?

The Winding-up Acts apply to three classes of companies: first, trading companies completely formed; second, companies completely formed, but which have not traded; and third, companies

¹ 5 Railway Cases, 496; 2 Exch. Rep. 290.

² 4 Railway Cases, 542.

³ 15 Meeson & Welsby, 501.

⁴ 5 Railway Cases, 149.

not completely formed, and which have not traded or done any business. To this last class the appellants would apply decisions which were pronounced in respect to the two former, as *Morgan's Case*,¹ which belongs to the first class, and is of the very highest authority, but not applicable to the present case. The question in it was, not whether Morgan was a shareholder, but whether, having been a shareholder in an established trading company, he assigned his shares so effectually as to be relieved from subsequent responsibilities. The Court held that he had not ceased to be a member of the company, and he was therefore held to be a contributory. *Lord Mansfield's Case*² belongs to the second class. He had applied for and received shares in the Universal Salvage Company, completely registered, and he paid the deposits. He refused to pay further calls, on the ground that the terms of the prospectus, on the faith of which he had taken the shares, were not carried out. He was held liable to contribute. The principle of the decision in *Beresford's Case*³ was applicable to the second * point in the present case. He had been an allottee of shares in a company, and paid deposits. He did not execute the deed of settlement of the company by the time therein specified, and the directors, acting on the power given them by the deed, declared his shares forfeited, and he submitted. The principal question was, whether the forfeiture of the shares was effectual, and the Master, the Vice-Chancellor, and Lord Chancellor held that it was, and that Beresford was not a contributory. *Parbury's Case*⁴ and *Sharpus's Case*⁵ had no application to the present, but *Fox v. Clifton*,⁶ *Pitchford v. Davis*,⁷ *Williams v. Pigott*,⁸ were strong authorities for the respondent's now liability.

*Mr. Rolt*⁹ said, he would only recapitulate the argument, being satisfied that Mr. Daniel had left nothing for him to add. Though Mr. Uphill may be held to have been a provisional committee-man, — which by itself raises no liability, — he was never a member of

¹ 1 Macnaghten & Gordon, 225; 1 Hall & Twells, 320.

² 2 Macnaghten & Gordon, 57; 1 Hall & Twells, 593.

³ 3 De Gex & Smale, 175; 2 Macnaghten & Gordon, 197; and 2 Hall & Twells, 388.

⁴ 3 De Gex & Smale, 43.

⁷ 5 Meeson & Welsby, 2.

⁵ 3 De Gex & Smale, 49.

⁸ 5 Railway Cases, 544.

⁶ 6 Bingham, 776.

⁹ He was not present when the respondent's counsel were called on.

the company. First, there was no effectual allotment of shares to him; secondly, if there was, he never took any. The "acceptance" did not imply "taking" of shares, and the condition in the secretary's second letter, which must be held to enter into the contract, neutralised the previous acceptance. Thirdly, if it should be held that there was an allotment and acceptance of shares, there was no payment of deposits, or any other monies, without which there is no liability. *Best's Case*¹ is quite in point.

Mr. Bethell in reply. — The cases that have been cited to show that an intended shareholder in an incomplete railway
 *687 company is not liable to pay debts of the *company are not applicable to questions of liability to contribution on the winding-up of a company. One part of the argument for the respondent has been, that by becoming a member of the provisional committee he incurred no liability to contribute, because, as by the cases at law, there was no legal liability, there was no equitable liability, and therefore there was no liability at all. That point has been already discussed in *Cottle's Case*, and it is not necessary to argue it again. The second point in this case, and which was not in *Norris v. Cottle* at all, is the liability incurred by the acceptance of shares. The answer given to that is, that there was no acceptance, that the second letter of the secretary imposed a new condition on the allotment communicated by his first letter, and as the respondent did not accept the condition, he did not accept at all. The argument was not maintainable; the contract was complete by the letter of acceptance.

LORD BROUGHAM, at the close of the argument, said it was impossible to overrate the vast importance of those cases. They had been most ably argued on both sides. The first case (*Norris v. Cottle*) had but one point, whether the mere fact of being on the provisional committee made one liable to be a contributory within the Winding-up Acts. But in the second case there was the additional point in respect to the acceptance of shares; and that again resolved itself into two points, first, whether there was any acceptance in consequence of the condition contained in the third letter, — whether the two letters constituted the contract, or the third was necessary to complete it; and, secondly, in case there

¹ Not reported.

was a complete contract constituted by the two first letters, and consequently a decided acceptance of shares, whether * that made the respondent a contributory. It was neces- * 688 sary to take some time to consider the authorities on this last point, and he would take an opportunity of conferring with one or two more of his noble and learned friends.

August 9.

LORD BROUGHAM. — In this case there is, to a certain extent, a similarity with the case just disposed of.¹ It is clear that the respondent knew his name had been put upon the provisional committee; because, in his correspondence with that committee, he added to his signature the initial letters P. C. So far the two cases are identical, and, were there nothing more, this must have followed the fate of the last case. But besides his name being put, with his knowledge and consent, on the committee, he was found by the Master to have accepted his shares (meaning of stock, and as a provisional committee-man), and upon this ground he was held to be a contributory. Upon appeal, the Vice-Chancellor Knight Bruce reversed the Master's order, and directed the name to be struck out. This order of his Honour is now before us by appeal; and I must observe that I have some reason to doubt if the facts were ever fully before that learned and very able Judge.

The evidence of acceptance of shares rests upon two, or, as it is contended by the respondents, on three, letters; one from the secretary the 10th of October, 1845, informs Mr. Upfill that one hundred shares in the company had been apportioned to each provisional committee-man, and asks if he (Upfill) is willing to take them. His answer on the 14th of October says, * “I accept the one hundred shares allotted to me”; not * 689 *apportioned*, but *allotted*; and he shows in what capacity he accepted them, by signing with the addition of P. C. to his name, meaning Provisional Committee-man.

It is contended that there was no *allotment*, but only, by the secretary's letter, an *apportionment*. This however cannot be allowed; for whatever may be the phrase used in the secretary's letter, the answer of Mr. Upfill treats the offer made as an *allotment*; he says, “I accept the one hundred shares *allotted* to me.”

¹ His Lordship had just given judgment in *Norris v. Cottle*.

This, if it stood alone, would import an absolute acceptance. But there follows a third letter, four days later, from the secretary. It is headed "Letter of Allotment. — Not transferable." It states the allotment of one hundred shares, and adds that a deposit of 2*l.* 12*s.* 6*d.* on each share must be paid on or before the 24th of October, otherwise the allotment to be null and void. The letter of allotment was to be presented, and would entitle the party to obtain his scrip, on executing the parliamentary contract and subscribers' agreement.

It is contended on the part of the respondent, that the acceptance was not final and complete till the third letter, because no terms had been stated in the first and second letter. But so no terms had been stated in the third. The price, the consideration for the shares, is not stated, nor in any way referred to in any of the three letters, except that the shares are said to be 25*l.* shares, which Mr. Uphill must be taken clearly to have known, when he became voluntarily a provisional committee-man, and accepted the one hundred shares as such.

Then it is said that the shares were, in the third letter, said not to be transferable. If this made any difference, it is not
 * 690 true, for the letter does not say that *the *shares* are not transferable, but only that the letter of allotment, as it is called, is not transferable; and which could not be transferred, because the first receiver in this case took his scrip, and paid his deposit, and signed the contract in his individual capacity as a committee-man, and others received their scrip in other capacities, and their letters were not transferable for the same reason.

Then as to the defeasance in not paying the deposit: that could make no difference in regard to the rights given before, or in regard to the position in which Mr. Uphill stood between the 14th and 18th of October. I am therefore of opinion that the offer and the acceptance, in the two first letters, constitute a complete and absolute acceptance by Mr. Uphill of the one hundred shares as a provisional committee-man, and that he became thereby a shareholder, as far as a person at that time could become a shareholder; that he became clothed and vested with his full right to obtain the situation of a shareholder, when that should be more completely conferred on him in the progress of the concern.

It is true, that by the subsequent letter, he is directed to pay the deposit, on pain of forfeiture, and that he took no notice of that

letter, and did not pay the deposit. Whether this determined his right to scrip and shares or not, it is unnecessary to inquire; he became a shareholder on the 14th, or a person entitled to be a complete shareholder by his own subsequent act; and which he could become if he chose to do what he was, by the rules of the committee he belonged to, called upon to do. It is very possible that no profit might result to him during the interval between the two letters of the 14th and 18th, or rather the day of * the delivery of that third letter; but if any gain had been * 691 made, he would have had his share, and he could not withdraw at his option from the liability which the holding this beneficial chance of profit imposed.¹

It is not, as I think, necessary to inquire whether or not this constituted a partnership;² but it appears to me impossible to avoid the inference that a person who accepts shares in the joint stock of a concern, which he knew was at least preparing to carry on operations with the view of gaining profit, must be understood to do an act which entitles him, eventually at least, to share in the gains; and that he thus must be taken to give an implied authority to his companions on the committee to pledge his credit, so far as his rateable proportion in the joint stock goes, for the necessary expenses of the committee in preparing the launch of the common concern. I hold that this authority, to be presumed from his acts, inures to the effect of making him incur a liability in respect of the things done by his companions of the committee or their officers; and I can find no decision at law to exclude the application of this sound principle to the case.

If the cases in the Court of Exchequer, followed by the other Courts, had laid down another principle,—if they had held that the being a committee-man, who had also accepted shares, in no respect authorised the incurring of the expenses required for the operations of the committee, in respect of the concern to which those shares appertained, I should then have been obliged to deny that there could have been a legal liability from implied authority; and it would have become necessary to consider whether or not the facts amount to a partnership. But I am of opinion that, independently of partnership, the liability exists. It may be said * that no partnership could be constituted by the * 692

¹ See *Bright v. Hutton*, 3 House of Lords Cases, at p. 379.

² See *Bright v. Hutton*, 3 House of Lords Cases, at pp. 373, 374.

acceptance of shares, until the company was formed; and the cases of *Nockels v. Crosby*,¹ in the King's Bench, and *Fox v. Clifton*,² in the Common Pleas, are relied upon. Those were cases of subscribers merely, and not of persons who were by their own consent in the management of the concern. The first case (that in the King's Bench) only held that the consideration on which the money had been paid, having failed by the company not being established, the money could be recovered back in an action for money had and received to the plaintiff's use, without deducting for the expenses of a secretary's salary, which secretary, as Mr. Justice Holroyd observed, had in point of fact never been appointed. The second of the above cases only held that the application for shares, and payment of a first deposit, did not constitute one a partner who had never interfered in the concern. Neither of these cases resembles the one before us; neither of them decides that if several persons join in a plan to form a partnership, and one of them accepts a given proportion of the stock, which would give him certain rights, were the partnership formed and in active operation, he can recover back money paid by him for necessary expenses in the parliamentary and provisional proceedings; or that he must not be held to give an authority, impliedly at least, to pledge his credit for the necessary provisional expenses of the concern, whereof he was provisionally a member.

I therefore differ from the view taken in the Court below, and hold that the order of his Honour the Vice-Chancellor should be reversed, and Mr. Uphill's name restored to the list of contributories.

* 693 * I entirely agree with Lord Cottenham's first observation in giving the judgment in *Besley's Case*, when he says: "I cannot for a moment entertain the idea that this company had not advanced to that state which made it the proper subject of an order under the Winding-up Acts. It may be quite right to draw within the operation of the Acts, concerns which require the aid of the Acts, — whether you call them companies or associations, by which name they may go, is quite immaterial; because it is only the fact that it has become an association or a company within the meaning of the Winding-up Acts, which could give the Court the power to wind up its affairs."³

¹ 3 Barnewell & Cresswell, 814.

² 6 Bingham, 776; and 9 Bingham, 115.

³ Vide ante note (f) p. 656; 2 Macnaghten & Gordon, at p. 181; 2 Hall &

It has been held by common law Judges that the circumstances in which we have here been proceeding were for a jury; but we are, in the Courts of Equity, both Judge and jury; and as for sending an issue to be tried, nothing can be more absurd; the verdicts could not bind us, and the whole object of the Acts would be defeated.

Mr. Rolt. — I do not know whether your Lordship's judgment goes to the number of the shares.

LORD BROUGHAM. — My judgment is founded upon both circumstances. It is not that every shareholder is liable, but that the provisional committee-man, who also receives the shares due to him in his capacity of provisional committee-man, gives an implied authority, and I most distinctly must guard this, as I have so stated twice over in my judgment: it is most distinctly to be considered as not deciding the point whether any person applying for shares would be so liable, or receiving shares, would be so liable; for aught I know *Nockels v. Crosby* might be material in that case.

* *Mr. Rolt.* — I mean, my Lord, as to the exact number *694 of shares as found by the Master, being one hundred. That number is got at by the resolution which apportions one hundred to each of the provisional committee-men.

LORD BROUGHAM. — No; that one hundred is got at by his own acceptance. I do not think that point was brought distinctly before us.

Mr. Rolt. — No, my Lord; there was no discussion upon it.

LORD BROUGHAM. — I wish it to be most distinctly understood, and it is of the greatest importance, that it is upon the two facts taken together that the judgment proceeds. One of them is found at law not to be sufficient without the second, and it is a question whether the second is sufficient without the first. However, the decision of the House goes upon both points concurring, namely, the fact of the party being, by his own choice, a provisional committee-man, *plus* his acceptance of shares. Lord Lyndhurst has unfortunately left town, so that I cannot state how he would view this matter, but I shall be able hereafter to do so. I ought to mention that I have communicated with my noble and learned friend Lord Cottenham upon this subject, and he takes exactly the

Twells, at p. 379; *Bright v. Hutton*, 3 House of Lords Cases, at p. 359, per Lord Brougham.

same view that I do. But that will probably have less authority on this account, that Lord Cottenham has a strong leaning upon the subject of liability, and he leans much more in favour of it than other Judges have been disposed to do, though he clearly negatives the doctrine ventilated at the bar here, rather than distinctly maintained, namely, that there was an equitable liability though not a legal liability; and that the legal liability is no measure of the equitable or general liability. To what amount the party shall in the present case be held liable, is not * 695 material; * if liable at all, he is a contributory, and the question brought by the appeal, and the question before the Vice-Chancellor was, whether Mr. Uphill was a contributory or not. If he was, the Master was bound to insert his name. But also he was bound to insert his name as he did, in respect of one hundred shares. To what this made him liable we have no business to consider.

It was ordered and adjudged, "that the said Order of the 24th of July, 1850, complained of in the said appeal, be, and the same is hereby reversed, and that the decision of the Master, that the respondent James Uphill should be included in the list of contributories of the said company, as a contributory in respect of one hundred shares of twenty-five pounds each, be, and the same is hereby affirmed, and that the said respondent be so included in such list accordingly, and that he do repay to the appellant all such costs (if any) as shall have been paid by the appellant to the respondent under the Order hereby reversed.

* 696

* BENSON v. CHAPMAN.

1848. July 3, 4. 1849. July 9, 27.

THOMAS BENSON, *Plaintiff in error.*JOHN CHAPMAN, *Defendant in error.*

*Insurance. Freight, Receipt of, by Holder of Bottomry Bond.
Total Loss. Abandonment.*

It is the duty of a master, in case of damage to the ship, to do all that can be reasonably done to repair it, bring home the cargo, and earn the freight.

Where, in case of damage to a ship, the master elects to repair it, the mere fact that the expenses of repair ultimately prove to be greater than the value of the ship will not be sufficient to show that he acted beyond the scope of his

authority, or to entitle the owner in an action on a policy on freight, to recover as for a total loss.

The receipt of freight by the obligee of a bottomry bond is, in law, a receipt of it by the shipowner, whose master has given that bond in discharge of expenses incurred in the necessary repairs of the ship.

The owner of a ship insured ship and freight. On leaving Pernambuco in June, 1839, the ship struck on a rock, and put back. After a survey, repairs were begun. They were continued for a long period, and the expense of them much exceeded the value of the ship and freight. The master, not being able to procure money in any other manner, was compelled to borrow on a bottomry bond, charging ship, freight, and cargo. On the 30th of December, 1839, the owner, in London, on being shown a letter addressed to the agents of the lenders on bottomry, in which the great expenses of the repairs were stated, gave notice of abandonment to the underwriters on ship and on freight. The ship arrived, and the freight was duly paid to the holders of the bottomry bond, under an order of the Court of Admiralty. The shipowner sued the underwriters on freight as for a total loss. The jury found, on a special verdict, that the plaintiff had acted *bonâ fide* without laches, and as a prudent owner of the ship and freight, if uninsured, would act:—

Held, that in this case, which was one of constructive total loss, the master might have abandoned at Pernambuco, but that having there elected to repair, he must be treated for * that purpose as the agent of the owner, * 697 whose acts bound the owner.

Held, also, that as the special verdict did not find that the owner, if on the spot, would not have repaired the ship, the Court could not infer that he would not have done so.¹

A partial loss of freight may be recovered on a declaration claiming a total loss. — Opinion of the Judges, at p. 722.

THIS was an action brought in the Court of Common Pleas, upon a policy of Insurance, on the freight of the ship Lord Cochrane, upon a voyage at and from Pernambuco to Liverpool. The freight was valued at 2000*l*. The plaintiff was the owner of the vessel.

The declaration was in the ordinary form, and averred a total loss of the ship by perils of the seas, a total loss of the freight, and an abandonment duly made.

The defendant pleaded, first, traversing the plaintiff's interest; secondly, denying that the ship was lost by the perils of the sea, in manner and form, &c.; thirdly, denying that the freight was so lost; fourthly, denying that the loss was occasioned by the perils insured against; and, fifthly, that the freight was abandoned. There was also a plea of set-off. Issues were taken on all these pleas.

¹ See *Bristow v. Whitmore*, 9 House of Lords Cases, 391.

Upon the trial of the cause before Mr. Justice Erskine, at Guildhall, in July, 1842, a verdict was found by consent for the plaintiff, subject to a special case for the opinion of the Court, which was to draw all inferences that might be drawn by a jury, with liberty for either party to turn that case into a special verdict. The ship in question, being at Pernambuco, received goods on board on freight for Liverpool, in the month of June, in the year of our Lord 1839. The amount of the freight was 2200*l.* Thus

laden, the ship, on the 29th of June, 1839, set sail on the
 * 698 voyage * insured against, but while proceeding out of the harbour of Pernambuco struck on a rock and a bank, and was compelled to put back to Pernambuco for repairs. There being no dry dock at that place, nor any other means of examining the ship, to ascertain the nature and extent of the injury, except by heaving down, it became necessary to take out the cargo, and heave the ship down, in order to make that examination. This was done, and several surveys were made; and finally, the master, in concurrence with M^cCalmont and Co., of Pernambuco, to whom on leaving England he had been directed to apply for a cargo, proceeded to cause the ship to be repaired. Pernambuco is a place very inconvenient and expensive for the repairs of ships; and these repairs, which it was stated were necessary in order to make the ship navigable and capable of performing the homeward voyage, continued from the 29th June, 1839, to the 4th of January, 1840, and amounted to the sum of 7132*l.* 3*s.* 8*d.* Though due means were taken at Pernambuco to obtain money from persons on loan, by bottomry and otherwise, none could be obtained, until M^cCalmont and Company consented to advance the sum of 7132*l.* 3*s.* 8*d.* on bottomry; and accordingly the master, on the 6th January, 1840, at Pernambuco, executed a bottomry bond to them, pledging the ship, freight, and cargo for that sum and bottomry premium at twenty per cent. On the 30th December, 1839, the plaintiff was shown a letter from M^cCalmont and Company, to their agents in London, which had been received by the latter, and which contained this passage: "Pernambuco, 14th November, 1839. The Lord Cochrane's repairs are likely to exceed 5000*l.*, with commissions, discharging, and reloading cargo, &c., &c."

* 699 * The plaintiff, thereupon, on the same day, gave the following notice to the underwriters on the ship and on the freight: "London, 30th December, 1839. My ship, the Lord

Cochrane, being insured as follows : Ship 3000*l.*, with the Indemnity Marine Insurance Company ; 700*l.* with the Dundee Marine Insurance Company ; 800*l.* with the Dundee Sea Insurance Company ; freight, 2000*l.*, with the Neptune Marine Insurance Company, and having sustained damage since she sailed with her cargo from Pernambuco, and having received information that the expenses incurred in relation to the accident will exceed the value of the ship and freight, and that the amount will be secured by bottomry, and that the repairs will still be incomplete, I do hereby abandon said ship and freight to the said respective insurers, according to their respective rights under the circumstances. I have further to acquaint the underwriters, that I am informed that a bill will be drawn upon me for the amount, which will exceed 5000*l.*, by the payment of which the bottomry premium may be avoided, and that I shall not accept such bill on my own account, but shall be ready to pay same for their account, upon their putting me in funds for that purpose.

“ For Self and Co. — Thos Benson.”

The plaintiff did not interfere in any way afterwards in respect of either ship or freight, nor ever personally received any part thereof. The ship having received the cargo again on board (in respect of the reloading of which certain expenses included in the 7132*l.* 3*s.* 8*d.* were incurred), sailed again from Pernambuco on the 6th January, 1840, and arrived with the whole of the original cargo, which was of the value of 19,139*l.*, on * board, at Liverpool, on the 19th of March, 1840. Upon * 700 the arrival of the ship, proceedings to enforce payment were taken by the obligees of the bottomry bond in the Court of Admiralty ; under the order of which Court, the ship was sold for the sum of 1675*l.*, and the freight was collected from the consignees of the goods, and the amount of both, under an order of that Court, was paid to the obligees. Upon making up the accounts of the disbursements at Pernambuco, according to the practice between assured and underwriters in London, the amount of the proportion of the 7132*l.* 3*s.* 8*d.*, and of the bottomry premium, to be borne by the freight, was settled at 569*l.* 11*s.* 3*d.*

The jurors found the first, second, and fifth issues for the plaintiff ; and as to the third and fourth issues, they found the facts ; and further found that in respect of all the aforesaid premises, the

plaintiff and the several other parties acted *bond fide*: and that the plaintiff acted without laches, and as a prudent owner of the ship and freight, if uninsured, would act, and the questions upon the facts so found were left by the jury to the judgment of the Court. In case the Court should be of opinion that the plaintiff was entitled to recover for a total loss, the damages were fixed at 2395*l.*; but if entitled to recover only for a partial loss, the damages were to be only 569*l.* 11*s.* 3*d.* Upon the facts so found by the jury, the Court of Common Pleas gave judgment for the plaintiff for a total loss.¹

The special case was then turned into a special verdict,
 * 701 * and the defendant sued out a writ of error in the Exchequer Chamber, and made a general assignment of errors.

The Court of Exchequer Chamber ordered a general reversal of the judgment of the Court of Common Pleas on the third and fourth issues, holding that the adventure was not, in point of fact, abandoned, and that as it was not found, it could not be inferred that a prudent owner, if uninsured, would not have repaired, the underwriters on freight were not liable as for a total loss. And it was also held that the Court was not at liberty to refer to the finding of the jury upon another issue — that the ship was wholly lost — and to take that fact as found, in deciding whether the freight was wholly lost, and lost by a peril insured against.²

The present writ of error was brought against this judgment.³

Sir F. Thesiger and *Mr. Peacock* (*Mr. Barstow* was with them) for the plaintiff in error. There are two questions in this case; first, was there a total loss; or secondly, was there a partial loss, by the perils of the sea, of this freight. If either of these questions should be answered in the affirmative, the judgment of the Court of Exchequer Chamber must be reversed; for that Court pronounced a general reversal of the judgment of the Court of Common Pleas, and discharged the defendant from all liability whatever.

¹ 6 Manning & Granger, 792; 7 Scott N. R. 625; 13 Law Journal N. S. C. P. 25.

² 5 C. B. 330.

³ The following Judges were present during the argument: Baron Alderson, Mr. Justice Patteson, Mr. Justice Coleridge, Mr. Justice Coltman, Mr. Justice Maule, Mr. Justice Wightman, Mr. Justice Cresswell, Mr. Justice Erle, and Mr. Justice V. Williams.

* There is a necessary connection between the character * 702 of owner of the vessel, and the title to receive freight. The interest in the freight depends on the ownership of the vessel, so that, if from any accident arising during the continuance of the voyage, the vessel should be totally lost, the title to freight, which is an accessory to the ownership of the vessel, would become likewise lost. This is the general rule, though some difficulty may arise in applying it to a case where there has only been a constructive, and not an actual total loss of the vessel. The phrase "constructive total loss" is not perhaps without objection, but it is now well understood, and it has been fully elucidated by Lord Abinger, in his judgment in the case of *Roux v. Salvador*.¹

The first question to be considered here is with reference to the notice of abandonment. If the vessel is in point of fact wholly lost to the owner, whether through an actual or constructive total loss, the underwriter on freight is liable to pay without notice of abandonment. The cases of *M^cCarthy v. Abel*² and of *Sharp v. Gladstone*³ do not impeach this general principle, although under the particular circumstances of those cases the owner of the vessel was held not entitled to recover the freight. Then comes the important decision of *Case v. Davidson*,⁴ which settled the law, that an abandonment to the underwriter on ship, transfers to him the title to the freight. There the vessel *in specie* came home and earned freight, and the underwriter on *ship having ac- * 703 cepted the abandonment, the voyage was treated as having been performed for his benefit. Had he not accepted the abandonment, the voyage would have been performed for the benefit of the owner. This was the correct principle, and it makes the cases respecting a contingent or dubious total loss consistent with those of an absolute total loss. But it is not in all cases that this notice of abandonment is necessary; for where the ship has been so much injured by the perils of the sea as not to be repairable at all, or not repairable without an expense exceeding the value of the ship when repaired, the assured may recover as for a total loss, without giving any notice of abandonment. *Cambridge v. Anderton*,⁵ *Roux v. Salvador*,⁶ *Allen v. Sugrue*,⁷ *Young v. Tur-*

¹ 1 Bingham N. C. 526; 3 Bingham N. C. 266; 1 Scott, 491.

² 5 East, 388.

³ 7 East, 24.

⁴ 5 Maule & Selwyn, 79; affirmed, 2 Broderip & Bingham, 379; 5 Moore, 116.

⁵ 2 Barnewall & Cresswell, 691.

⁶ 3 Bingham N. C. 266.

⁷ 8 Barnewall & Cresswell, 561; 3 Manning & Ryland, 9.

ing,¹ and *Mellish v. Andrews*.² The plaintiff in error contends that here there was a total loss in fact, and consequently no necessity for a notice of abandonment.

If in this case there had been actual total loss, it is clear that there would not have been any necessity to abandon; but supposing the necessity to have existed because there was a case of constructive and not of actual total loss, then it is contended that notice of abandonment was duly given, and that the question for consideration relates only to the effect of that notice. It must be contended, on the other side, that no effect favourable to the owner of the vessel followed from that abandonment, but rather that it has deprived him of the rights to which he would otherwise

* 704 have * been entitled; for that now the loss must be considered to have arisen, not from the perils of the sea, but from the abandonment, and that consequently the loss was the act of the plaintiff himself. An endeavour will be made on the part of the defendant to support this argument by assimilating this case to that of *M. Carthy v. Abel*.³ But the two cases do not resemble each other, since there the rights of the owner were by a voluntary act, an act not compelled by necessity, transferred to the underwriter, who, being thus made to stand in the situation of the original owner of the vessel, was entitled to receive its earnings in virtue of that voluntary act. Here the transfer was an involuntary act, the direct consequence of the perils insured against. The case of *Idle v. The Royal Exchange Assurance Company*,⁴ and *Gardner v. Salvador*,⁵ are important to show that in order to enable the owner to recover, it is not necessary that there should be an actual absolute total loss, but that he may recover, if such circumstance exist, as in the present case created a necessity for the abandonment. In *Idle v. The Royal Exchange*, Lord Chief Justice Dallas, when delivering the judgment of the Court, anticipated and answered the argument relied on by the defendant in error here. His Lordship observed: ⁶ “ Here it is said that the loss arose out of the act of the owner in selling, and that the sale was not induced by any peril of the sea. But this distinction seems to me also to be a fallacy; the state of the ship which led to the sale was induced

¹ 2 Manning & Granger, 593; 2 Scott N. R. 752.

15 East, 13.

5 East, 388.

⁴ 3 Moore, 115; 8 Taunton, 755.

⁵ 1 Moody & Robinson, 116.

⁶ 3 Moore, at p. 151; 8 Taunton, at p. 778.

by the perils of the sea ; so that though the sale arose immediately * out of the act of the captain, yet that act was * 705 induced by a peril which had taken place and put the ship into a state in which the verdict finds that in point of fact it was proper to sell." It is in the same way a fallacy to say that the loss arose from the abandonment, and not from the perils of the sea, where the latter were so clearly the occasion of the former.

In answer to this claim, it will be said that here the ship was in part repaired, and brought home the cargo, and that the assignees of the bottomry bond receiving the freight were in the same situation as the owner, and that the receipt of the freight by them was the receipt of it by him. To raise this argument, it must be contended that by repairing the vessel, the owner declared his election to continue the voyage, and so prevented himself from afterwards claiming as for a total loss. It may be admitted that he might have repaired it, though satisfied that the expense of the repairs would exceed the value of the ship, and though he might thereby have disabled himself from suing the underwriters on freight. Here the owner has not brought himself within any such rule. It was the master who made the repairs ; it was the owner who gave the notice of abandonment as soon as he heard of them. The act of the master was at once repudiated by the owner. Under these circumstances, to deprive the owner of his rights, because of the repairs done by the master, would be to lay down the rule, that under all circumstances, and for all purposes, the master is the authorised agent of the owner alone, and can absolutely bind him by any act done during the voyage. There is no rule of law to that effect. The case of *Fleming v. Smith*¹ does not proceed on that principle, but rather on its opposite ; * for there it was the act of the owners themselves, who * 706 recognised and adopted the acts of the master, which were held to prevent them from recovering against the underwriter. No master can bind the owners except for necessary repairs ; such as are required to enable the vessel to perform the voyage, and such as a prudent owner, if present, would order to be made : *Webster v. Seekamp*,² *Cary v. White*.³ These and other cases to the same effect are all collected in *Abbott on Shipping*.⁴ No pru-

¹ 1 House of Lords Cases, 513.

² 4 Barnewall & Alderson, 352.

³ 1 Brown P. C. 284, ed. 1784 ; 5 Brown P. C. 325, ed. 1803.

⁴ 8th ed. (by Mr. Serjeant Shee) 135.

dent owner on the spot would have ordered repairs which, costing 7000*l.*, left the vessel worth only 3000*l.* or 4000*l.* The *Case of The Alexander* before Dr. Lushington, on the 9th of March, 1842,¹ is important on this point; the limits of the master's authority to bind the owner for repairs being there most clearly defined. That learned Judge said:² "The result of the cases is, first, that the money must have been necessary; secondly, that it must have been applied to the use of the ship. Now the only distinction between the advance of necessaries and money is, that, though in both the *onus probandi* is the same, there is, wisely and properly, a difference in the extent of proof required. I cannot find any case in our own law which does not require that the proof that the articles furnished were necessary should come from the plaintiff, to the extent of showing that they were what a reasonable and prudent owner would have ordered." He then notices a dis-

distinction raised in the Scotch Courts between money and
 * 707 other articles, and * says: "That distinction is wholly unsupported by any authority in English law. I think in the case of an anchor and cable, less evidence might suffice to prove the necessity, in the legal sense of the term, than in respect to other articles; but still there must be some evidence, and I think that the doctrine which casts the *onus probandi* on the tradesman or material-man who provided the articles is founded on great and important principles, and that the rule is wisely framed to prevent great abuses. To charge one man for the acts and dealings of another is, *primâ facie*, contrary to natural law; but when it appears that such other person was authorised to a given extent, when the relation of principal and agent is established, then it becomes reasonable to fix the principal with responsibility, but a responsibility properly guarded and restrained, by requiring the creditor to use reasonable diligence to ascertain that the want of the article is such that the owner himself would have sanctioned the purchase." If that case is correctly decided, then the act of the master here cannot be properly described as one which "the owner himself would have sanctioned."

The moment that a total loss occurs, the master ceases to be the agent for the owner alone, for the relation between them exists only in respect of the voyage, and of the vessel in the actual prosecution of the voyage. After the happening of the event

¹ 6 Jurist, 241.

² 6 Jurist, at p. 242.

which constitutes the total loss, the captain becomes the agent for all concerned. *Green v. The Royal Exchange Company*,¹ and *The General Interest Insurance Company v. Ruggles*,² in which, though the circumstances * of the case do not apply here, *708 the principle stated is very clearly applicable.

The master here might, when the accident happened, have sold the vessel for the benefit of all concerned: if so, then that accident which, in the exercise of a sound discretion, compelled him for the benefit of all concerned to repair the ship, may be described as the occasion of a total loss. *Read v. Bonham*,³ *Doyle v. Dallas*,⁴ *Hunter v. Parker*,⁵ in the last of which cases Baron Parke thus sums up the law in this matter: ⁶ "The master has by virtue of his employment not merely those powers which are necessary for the navigation of the ship, and the conduct of the adventure to a safe termination, but also a power, when such termination becomes hopeless, and no prospect remains of bringing the vessel home, to do the best for all concerned." If so, then it is clear that he had no power exclusively to bind the owner; his duty was to make sale of the vessel, and rescue all he could from the wreck, for the general benefit. It is a fact that he had the power, and this power exists only under circumstances which constitute a total loss, and his authority to repair, and his authority to borrow on bottomry, depend on the same circumstances, and must be exercised under the same restrictions, and cannot therefore affect the owner alone, but must be exercised by him as a person acting for the benefit of all concerned.

The principle applicable to a case of contingent loss is declared in *Holdsworth v. Wise*.⁷ In the report * in *Manning* *709 and *Ryland*, it is said: ⁸ "It is not enough to restore the ship in specie: it must be restored in an unfettered state, in a state which leaves her possession useful and beneficial to the assured." Here the ship could not be restored in that state, and the doctrine there laid down on that point is applicable here; and the case itself is similar to the present in another respect, as it shows that the master has power to bind the owner, by ordering repairs, but

¹ 6 Taunton, 68.

² 12 Wheaton, 408, 413.

³ 3 Broderip & Bingham, 147.

⁷ 1 Manning & Ryland, 673; 7 Barnewall & Cresswell, 794.

⁸ 1 Manning & Ryland, at p. 682.

⁴ 1 Moody & Robinson, 48.

⁵ 7 Meeson & Welsby, 322.

⁶ 7 Meeson & Welsby, at p. 342.

that when doing so he ceases to be the mere agent of the owners, and becomes the agent for all concerned. The Court of Common Pleas here justly considered, that if the master had actually sold the ship at the time of the damage, no doubt could have existed as to the owner's right to recover as for a total loss. If so, two questions arise: first, if the owner had been present at Pernambuco, would it have been prudent for him to repair the ship; and, secondly, would he have acted prudently in not repairing? These two questions, answered as they have been by the jury, establish a case of a total loss, and show the right of the plaintiff to recover. The judgment of the Court of Exchequer Chamber, therefore, cannot be maintained, but that of the Court of Common Pleas must be restored. And, at all events, should the House deem the judgment of the Court of Exchequer Chamber to be right, in disallowing the claim for a total loss, the judgment of that Court, which was one of general reversal of the Court below, must itself be reversed, and the claim of the plaintiff for a partial loss, which can be recovered under a declaration for a total loss,¹ must be established.

* 710 * *Sir F. Kelly and Mr. Martin* (*Mr. Ogle* was with them)
for the defendant in error.

The judgment of the Court of Exchequer Chamber is right throughout. There has not been any loss of freight in this case, for the freight has been earned and paid. It has been in substance paid to the assignee of the freight, for such was the character of the obligee of the bottomry bond, by whom, in fact, the freight was received, and who must be taken to have received it on account and for the benefit of the owner.

The judgment of the Court of Common Pleas proceeded on a misconception of fact. It was there assumed that an actual constructive total loss had taken place,² and all the reasoning of the Court went on that assumption. Now, the injudicious expenditure of money on repairs, to an amount which exceeds the value of the vessel after those repairs have been completed, does not constitute a total loss, and certainly not a total loss occasioned by the perils of the sea. It may be admitted that it is the duty of the

¹ *Park on Insurance*, 600, citing *Gardiner v. Croasdale*, 2 Burrow, 904; 1 W. Blackstone, 198; *White v. Bodinam*, 2 Salk. 629; 1 Wms. Saund. 312 e.

² 6 *Manning & Granger*, at p. 810.

master of a ship in a foreign port to have repairs done so as to enable him to complete the voyage and bring home the goods which he has received on freight. That argument only strengthens the case for the defendant in error. For such a purpose the master is the authorised agent of the shipowner; and there is no statement in the case that the expenses caused by these repairs were not lawfully due from the owner of the ship. If so, and if the master secured the payment of them by giving a bottomry bond, the person who received the freight in discharge of that bond must be taken to have received it on the part of the person who gave the bond; in other words, of the owner of the vessel.

* It is a most extraordinary argument to put forward that *711 the master is the agent, not for the owner, but for the underwriter. Yet that argument has been used here with a view to show that there was a constructive total loss in the case, and that after its occurrence the captain was no longer the agent of the owner alone, but agent for the interests of all concerned. The argument cannot be supported in law, and, in fact, the captain acted as the agent of the owner alone. The decision of the Admiralty Court that the bottomry bond was valid, for the purpose of transferring the right to freight from the owner to the obligee, shows that the master was the agent of the owner, and had authority to pledge the owner's credit.

In order to make a constructive total loss, there must be an election to make it so at the time and spot of the accident. The election having been once made, it cannot be recalled. Here the election was made by the captain, against whom fraud is not imputed, who was the agent for the owner, and who acted as such throughout. The captain elected to repair the ship, and to take the benefit that thereby might accrue; and he, the owner's agent, having so elected, the owner cannot now insist upon a constructive total loss at all. It is most essential to adhere to the rule that the owner of the vessel is not by himself or his agents to take the chance of repairing a vessel, to incur thereby an enormous expense, and then, when the chance turns out unfavourable, to throw the whole loss on the underwriters.

There was here no abandonment of freight at all, or none made in time. *Anderson v. The Royal Exchange Insurance Company*.¹ The title to the freight * was clogged with a lien, *712

¹ 7 East, 38.

created by the act of the owner's captain, for the benefit of the owner. The freight certainly was not abandoned. It is a fallacy to speak of abandoning a thing to a man for his benefit, when, by a previous act of the person affecting to make the abandonment, no benefit can arise to the abandonee. Here the freight could not possibly be of benefit to the underwriter, for it had been previously assigned on bottomry for advances made to the owner of the ship. The finding of the jury on this part of the case is unintelligible. Besides, an act of abandonment does not transfer the property in the ship and freight, but merely entitles the insurer, by operation of law, to receive credit for what the ship and freight will produce; the property itself does not pass. The ship registry acts do not notice such a transfer of property, for they contain no exception dispensing with their provisions in the case of a transfer in the property of the ship occasioned by operation of law. It follows therefore that that part of the special verdict which alleges that the owner of the ship acted *bonâ fide*, and as a prudent uninsured owner might have acted, has no bearing on this case, while it is a very strong circumstance in the defendant's favour that the special verdict nowhere states that a prudent owner, had he been on the spot at the time, would not have begun to make these repairs with the view of rendering the ship competent to complete the voyage, and to bring home the cargo. As this House can only proceed on what is actually stated in the special verdict, it must be taken that a prudent owner would have made these repairs; and if so, then the act of election is complete, and the plaintiff cannot be allowed afterwards to recall it.

*713 *This case is distinguishable from that of *Holdsworth v.*

Wise,¹ on which the judgment of the Court of Common Pleas was principally vested. It may be admitted as a general proposition, that where the damage arises from the perils of the sea, and where the ship cannot be put into a state of repair necessary for the pursuing of the voyage, except at an expense greater than the value of the ship when repaired, the master is not bound to incur that expense; but then there must be an abandonment, and that must be made by the owner, or his authorised agent at the time. He cannot exercise his discretion as to repairing, then bring the ship home, and earn freight, and yet claim for a total loss. If therefore, as in this case, repairs are executed by the

¹ 1 Manning & Ryland, 673; 7 Barnewall & Cresswell, 794.

authority of the master, and the ship brings home the original cargo, and freight is actually received thereon, it is impossible to contend that in such a case the underwriter on freight can be liable to the assured. *M'Carthy v. Abel*¹ establishes the contrary of such a proposition.

One of the tests applicable to this case, to show that the freight received under the bottomry bond has been received by the order and for the account of the owner, is to be found in the situation of the underwriter on the ship. Suppose he had had an agent on the spot competent to act for him, and that the master had made a valid abandonment, that the underwriter's agent had accepted it, and had taken to the ship, and ordered the repairs, and brought home the goods. It is clear that he would be entitled to the freight. But how could he get it? He could only sue for the freight * in the name of the person with whom the con- * 714 tract for the freight was made, and he must therefore use the name of the owner of the ship, and would be liable to all the equities that might be set up in answer to the claim if made by the owner himself. This shows that the receipt of the freight by the assignee of the owner is a receipt of it by the owner himself, and the freight here has been received in that manner.

Whenever the freight has been received, no matter under what circumstances, the underwriter on freight is exempted from liability. *Everth v. Smith*.² There the expenses of a detention by embargo exceeded the freight, so that the freight was on the balance of accounts wholly lost; but it was held that though the policy attached at the time of the detention, yet that freight having been afterwards earned by the vessel bringing home the cargo, the underwriter on freight was not liable. *Falkner v. Ritchie*³ is to the same effect, and both alike show that the election to abandon must be at once made; and that if the owner knows by any method whatever that the vessel is in a port of safety, and is in a condition to complete the voyage, he from that moment loses his right of election. The case of *Idle v. The Royal Exchange*⁴ does not impugn that doctrine, for that only establishes that in a case of actual necessity, the master may justify selling the ship; and the *Case of The Gratitude*⁵ proves that the master has authority to bind

¹ 5 East, 388.

⁴ 3 Moore, 115; 8 Taunton, 755.

² 2 Maule & Selwyn, 278.

⁵ 3 Robinson Adm. Rep. 240.

³ 2 Maule & Selwyn, 290.

the owners, for there a bond given by him was enforced by the Court.

* 715 Now as to the question of the cause of the loss of * the freight: suppose, which is however denied, that there has been a loss of freight, still, unless that loss has been caused by the perils insured against, no liability has been incurred by the underwriter. The owner here did not receive the freight. Why? Because it had been previously received by the obligee of the bottomry bond, through the act of the authorised agent of the shipowner. The owner would have received the freight, if the master had not pledged it at Pernambuco. It cannot therefore be said that the freight was lost by the perils of the sea, although it may be true that the act of the shipowner's agent never would have taken place had not those perils occurred. *M^r Carthy v. Abel*¹ shows that under such circumstances the loss was not occasioned by the perils insured against, and, therefore, could not be recovered. That case is decisive of the present. There the ship and freight had been separately insured. The ship had been seized under an embargo, on hearing of which the owner abandoned to the respective underwriters, who accepted the abandonment. The embargo was afterwards taken off, and the ship completed the voyage and earned freight. It was held that the owner could not recover as for a total loss of freight, which, if lost at all, had been lost, not by the perils insured against, but by the voluntary act of the assured. The only difference between these two cases, is, that in this there was an obligee of a bottomry bond, by whom the freight has been received, while there it was received by the underwriters on the ship, who were treated by the Court as having

* 716 ing received it "by and on * behalf of the assured," and it was therefore held, that no loss of freight had occurred. Unless that case is to be overruled, it must decide the present; for here the owner assigned the freight, and by that assignment, and by that alone, lost the right to receive it.

Then as to the question whether a partial loss can be recovered under this declaration. In the first place, the defendant denies that there has been any loss of freight whatever, for the whole has been earned and received, but at least there was not loss occasioned by the perils insured against; and, in the next, he contends that, for the plaintiff to recover on this declaration, the loss on the

¹ 5 East, 388.

freight must be total. The finding of the jury merely assumes a partial loss, but that finding is not binding on the Court.

Mr. Peacock in reply. — First, as to the denial that 'there has been any total loss of freight, or any loss by the perils insured against. The circumstances under which the plaintiff was deprived of the right to receive the freight constituted a total loss of freight. Assuming that the bottomry bond was a debt which the owner was bound to pay, then it is clear that that debt was occasioned by the perils of the sea, and by the enforcement of the debt so occasioned, the assured, in fact, received no freight. The observation of Lord Chief Justice Dallas, in *Idle v. The Royal Exchange*,¹ applies here, and a debt so occasioned and so operating must be considered as a loss by the perils of the sea. Secondly, as to the agency, the cases of *Buxton v. Snee*,² *Milles v. Fletcher*,³ *The Gratitude*,⁴ and *Fleming v. Smith*,⁵ show many instances in which the master ceases to be the sole agent for the owners, and becomes a person acting for all concerned. The *Case of the La Constancia*⁶ which was three different times under the consideration of the Court, establishes the same principle. The owner is not personally liable on a bottomry bond, *Johnson v. Shippin*;⁷ but the bond is to be enforced against the ship and the freight, and, in case of necessity, the cargo.

Then as to the omission in the special verdict of a finding that if the owner had been on the spot he would not have ordered these repairs. No such finding could have been made, for, under the circumstances stated here, it is clear that a prudent and an honest owner would have begun these repairs with the purpose of completing the voyage, and so preventing a loss to any one. At that time it was impossible to know that the expense of the repairs would exceed the value of the ship. The cases of *Young v. Turing*,⁸ and *Irving v. Manning*,⁹ established the principle that a master, acting *bonâ fide* in making such repairs does not thereby preclude the owner from afterwards abandoning. The owner has the right

¹ 3 Moore, 115, 151. See ante, p. 704.

² 1 Ves. Sen. 154.

³ Douglas, 231.

⁴ 3 Robinson Adm. Rep. 240.

⁵ 1 House of Lords Cases, p. 513.

⁶ 2 Robinson Adm. Rep. Temp. Lushington, 404.

⁷ 1 Salkeld, 35.

⁸ 2 Manning & Granger, 593.

⁹ 1 House of Lords Cases, p. 287.

to do so, as soon as he knows the real circumstances of the case ; and here he did abandon on the very day on which the information reached him through M'Calmont's letter. At the time that he gave notice of abandonment the repairs were not completed.

* 718 Finally, it is clear that the * plaintiff is entitled to recover something, for at all events there has been a partial loss ; but it is submitted that the circumstances of this case show the loss to have been a total loss, and that the plaintiff in error is entitled to judgment for his whole demand.

LORD BROUGHAM. — I propose that the following questions shall be put to the Judges : First, “ Whether on the facts stated in the special verdict, the plaintiff is entitled to recover as for a total loss of the freight ? Secondly, “ Whether, upon the pleadings and the facts stated in the special verdict, the plaintiff is entitled to recover for a partial loss of the freight ? ” and, thirdly, “ Whether the findings of the jury do not entitle the plaintiff to a verdict for 569*l.* as for a partial loss ? ” It may, in the result, be the opinion of the Judges that either there has been a total loss, or none at all ; but it is much better that both the questions as to total and as to partial loss should be considered by the Judges.

The Judges requested time to consider their answers, and time was given accordingly.

July 9, 1849.

BARON ALDERSON delivered the opinions of the Judges. — The first question put by your Lordships to the Judges is, “ Whether, upon the facts stated in the special verdict, the plaintiff was entitled to recover as for a total loss of the freight ? ”

We are all of opinion that he was not.

The special verdict states that the ship, with a cargo on board, left Pernambuco, on the voyage to Liverpool, on the 29th June, 1839 ; and in proceeding out of the harbour struck on a rock, and was obliged to put back to be repaired ; that the master, after
* 719 several surveys, * and with the concurrence of the persons to whom he had been addressed by the plaintiff to procure a cargo, proceeded to effect the repairs, which continued from the 29th June to the 4th January following ; that the expenses of them

amounted to the sum of 7132*l.* 3*s.* 8*d.*, much exceeding the value of the ship and freight, which sum, the master not being able to procure it in any other manner, was compelled to borrow on bottomry, and executed a bottomry bond, charging the ship, freight, and cargo; that the cargo had been necessarily taken out during the repairs, but was reshipped; the ship sailed on the 6th of January, 1840, and arrived with the cargo at Liverpool; and that the obligees of the bond received the freight, under a decree of the Court of Admiralty.

The freight therefore having been earned, it is plain that the plaintiff cannot recover for a total loss of that freight, unless he can repudiate all that was done by the master, and treat the ship and freight as wholly lost at Pernambuco on the 29th of June.

The special verdict does not state *when* the plaintiff was first informed of the accident to the ship. The only information to the plaintiff which it notices is that conveyed by a letter from Pernambuco, dated the 14th of November, 1839, which was received on the 30th of December in that year, and contains this passage: "The Lord Cochrane's expenses are likely to exceed 5000*l.*, with commission, discharging, and reloading cargo, &c." On the same day the plaintiff gave notice of abandonment of the ship and freight to the respective underwriters on each, and did not interfere in any way afterwards in respect of either ship or freight.

It is undoubtedly a rule that the facts are to be taken as stated in a special verdict, and that inferences * of fact are *720 not to be drawn by the Court; but it is material to observe that this special verdict does not state that the plaintiff abandoned when he first heard of the accident, or even when he first knew that the ship was under repair, nor that, in common prudence, he would not, if he had himself been at Pernambuco and uninsured, have done precisely what the master did.

The duty of the master in case of damage to the ship is to do all that can be done towards bringing the adventure to a successful termination; to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous; and to bring home the cargo, and earn the freight if possible.

In the absence of any finding to the contrary, we must assume that this duty was properly performed; and it may well have been so, for consistently with all the facts found in the special verdict, the expenses in the course of repairing may have been discovered

to be much greater than was at first contemplated, without any fault in the master or those under whose advice he acted. Subsequent events may show that he acted erroneously, but we think it impossible to say that he acted beyond the scope of his authority, or that the plaintiff is entitled to treat him as being no longer his agent as soon as he commenced the repairs, and to consider the ship as a new ship, or the adventure in the voyage home as a new adventure, as he might have done if the master had, as perhaps the facts might have justified him in doing, abandoned the adventure, and sold the ship. The election to repair was made, and the repairs commenced in July, 1839, and the facts found by the special verdict are not sufficient to show that the master in

* 721 making that election acted beyond * the scope of his authority; for he certainly had authority to act as a prudent uninsured owner would have done, and it is not found that an owner so situated would have acted differently. Under these circumstances the plaintiff was, we think, bound by that election of the master, and could not in the month of December following, when he heard of the great amount of the expenses, get rid of that election, and put himself in the same situation as if no repairs had been done. The abandonment can have no effect under such circumstances. If the loss, being a loss by damage to the ship, was total in the first instance, no abandonment was necessary; if it was not, abandonment could not, even at the first, make it so; much less, after the plaintiff, by his agent, had elected to repair, and after the repairs had been nearly completed.

In cases of capture or detention, where the loss is apparently total, abandonment to the underwriters on freight may be very important; but even in such cases, if the ship is retaken or released, and freight earned before action brought, the owner cannot recover on the policy on freight; nor indeed is there any instance to be found in which an action for a total loss of freight has been held to be maintainable where the freight has been actually earned.

We have no doubt that the receipt of the freight by the obligee of the bond was, in law, a receipt by the plaintiff, having already expressed our opinion that he was bound by the election of the master to repair, and of course bound by the bottomry bond which became necessary to be given to effect the repairs; and even if it had not been a receipt by the plaintiff, still he would not have

been prevented from receiving the freight by the perils insured against, but by his own act in pledging * the freight * 722 by the bottomry bond, and he might have obtained the freight if he had chosen to pay off that bond. The freight was not actually lost by the perils insured against, for it was in point of fact actually earned; nor can it be said to be lost to the plaintiff by those perils; but if lost to him at all, it has been lost by his own acts and omissions.

We say nothing as to the finding of the jury on the issue as to the total loss of the ship, because your Lordships' question is confined to the effect of the special verdict, which is found only on the third and fourth issues, and cannot be altered or construed by the findings on the other issues.

To the second question put by your Lordships, "Whether, upon the pleadings and the facts stated in the special verdict, the plaintiff was entitled to recover for a partial loss?" we answer in the negative. The pleadings indeed present no obstacle, for if a partial loss of freight can be recovered at all, we know no reason why it may not be recovered on a declaration claiming a total loss, as is constantly the case in actions on policies on the ship; but here if any freight was earned, the whole freight was earned; and we have already expressed our opinion that freight was earned. The whole original cargo was reshipped and brought home.

To the third question put by your Lordships we answer, that the findings of the jury do not entitle the plaintiff to a verdict for 569*l.*, or for a partial loss. We have already expressed our opinion that the facts stated in the special verdict do not entitle the plaintiff to recover for a partial loss, and the findings on the other issues do not in any respect touch this question. As to the sum of 569*l.*, which is alleged to be the proportion * of the expenses at Pernambuco which the freight ought to * 723 bear, a question might have arisen if the underwriters on freight had accepted the abandonment, and paid the total loss claimed; for then, the freight having afterwards been received, if the underwriters had claimed it as money had and received to their use, and could have supported that claim, an attempt might have been made to deduct the 569*l.* as salvage of the freight; but no such question arises in this action, in which the sum insured is claimed as lost freight, not as money paid by way of average or salvage, or in any other manner than as by loss of freight. The

underwriters upon this policy engage only that freight shall be earned, and it has been earned. At all events, if by the terms of the policy any other contract can be considered to be entered into, the declaration in this case is not adapted to such contract, or to any thing but loss of freight.

July 27, 1849.

LORD BROUGHAM. — In this case the learned Judges have given a unanimous opinion ; and I entertain no doubt upon the question. Indeed, my noble and learned friend and I held the same opinion during the argument : I therefore move your Lordships that judgment should be given for the defendant in error.

LORD CAMPBELL. — I think this case does not admit of any reasonable doubt. There is here neither a partial nor a total loss of freight, because the goods, the freight of which was insured, were loaded at the port of outfit, and were
 * 724 * delivered at the port of destination, and the freight was paid. To be sure, it was not received by the owner of the ship, but it was received under his authority, and unless you are altogether to discard what the master had done, or to suppose that he had acted fraudulently or without authority, there can be no doubt that the judgment should be for the defendant in error. Therefore I entirely concur in the motion of my noble and learned friend.

*Judgment for the defendant in error, with costs.*¹

¹ In connection with this case see that of *Duncan v. Benson*, 1 Exch. Rep. 537, where an owner of goods, who had been obliged to contribute towards the payment of the bottomry bond, and of the costs of the suit instituted in the Court of Admiralty by the obligee of that bond, was held entitled to maintain an action against the owner of the ship on an implied promise to indemnify. A plea, setting forth the special circumstances, and denying the authority of the master, and alleging that as soon as defendant had notice of the repairs, and of the fact that the costs of them exceeded the value of the ship and freight, he abandoned the ship and freight, was held bad on general demurrer.

*ROWLEY v. ADAMS.

*725

1848. May 8, 9, 15, 16, 18, 22. 1849. July 27.

THOMAS HENRY ROWLEY and his brothers and sisters ; and WILLIAM HENRY ORCHARD and his brothers and sisters,	}	<i>Appellants.</i>
SAMUEL ADAMS and EDMUND MARKS and others,	}	<i>Respondents.</i>
(Original Appeal.)		
The said S. ADAMS and E. MARKS,		<i>Appellants.</i>
The said T. H. ROWLEY and all the other Appellants and Respondents in the original appeal,	}	<i>Respondents.</i>
(Cross Appeal.)		
WILLIAM WYATT,		<i>Appellant.</i>
The said S. ADAMS and E. MARKS and others,		<i>Respondents.</i>

Duties and Liabilities of Trustees and Executors. Wilful Default.

In 1825 Henry Wyatt and his son Henry E., who had previously carried on business as brewers, admitted another son, George, into partnership. By the partnership deed, it was agreed that the plant, &c. which was stated to have been valued at £3,000*l.*, exclusive of the stock and debts, should be the capital, to a moiety of which the father was to be entitled. His surplus monies in the business were stated to amount to 48,915*l.*, on which he was to receive interest. He died in July, 1826, having, by his will, given his surplus capital to his executors, in trust to invest the same in government or other security, and pay the income to his wife, and after her death to set apart two legacies of 12,000*l.* each for his two daughters and their children; he gave his interest in the business and the stipulated ordinary capital to his sons Henry E., George, and William, who was a minor, and he directed his executors to carry on the business, in conjunction with his two sons, until William attained twenty-one, and he empowered them to sell his share in the brewery during his minority. He charged his freehold and other property with the payment of his surplus capital, and directed mortgages of his real estate for securing the legacies. The will was not proved till December, 1827, the executors having in the mean time left the surviving partners in the undisturbed possession of the partnership property; and the business, although they did not take any active part in it, was carried on with their concurrence. Disputes having arisen between the surviving partners, the adult legatees filed a bill in 1827 for administration, which, through the interference of the executors, was abandoned.

In 1828 the executors joined in deeds whereby the partnership was dissolved, and Henry E. assigned his interest to George, in consideration of 20,000*l.*, and the executors released Henry E. from all claims in respect of any surplus capital. The business, which was afterwards sold with the sanction of the Court, was found to be insolvent, and the partnership property turned out to

be wholly unproductive to the testator's estate. The executors then filed a bill for administration of the estate; and in January, 1831, a bill was filed by the children of the testator's two daughters, seeking to charge the executors with wilful default in not having obtained payment of the legacies out of the surplus capital.

- * 726 * By several decretal orders, made in both causes, accounts were directed to be taken as to the accuracy of the recitals in the partnership deed, the value of the plant, and the surplus money due to the testator at his death; and accounts were directed to be taken of the partnership dealings and transactions; and if the Master should find that he was unable to take such accounts, by reason of the non-production of books of account, he was to state the circumstances. The Master, having reported that he could not take the accounts for non-production of books, he was, by another order, directed further to inquire by whom the partnership property was possessed at the death of the testator, and how disposed of, and whether the executors, with due diligence, and without their wilful default, might have possessed themselves, out of the partnership property, of sufficient to pay the two legacies of 12,000*l*. The Master again reported that he was unable to take the accounts, by reason of the non-production of the books; he found, however, on the evidence before him, large sums to have been due to the testator at his death, and large partnership assets, and that the executors might, with due diligence, and without their wilful default, have possessed themselves out of the partnership property, of a sufficient sum to pay the two legacies. The Court, upon exceptions, negatived the finding of wilful default:—

Held, by the House of Lords, that there was no just ground of appeal against the order directing further inquiries as to sufficiency of assets, and wilful default of the executors.

If an order directing inquiries be deemed unnecessary, the party objecting should promptly apply to the Court to discharge it; as a Court of Appeal would not listen to objections taken after the delay and expense of the inquiries were incurred; and if it did, it would reject the information so obtained. *Infra*, p. 767.

Held also by their Lordships—affirming the order of the Court below upon the exceptions—that the Master's findings of the sufficiency of assets, and wilful default, were displaced by his former findings—confirmed by the Court—of the impossibility of ascertaining the testator's surplus capital; that there was no reason for thinking that the surplus capital could, if at all, have been realized, without putting an end to the business, which the executors could not do without breach of their duty; that though the executors had not properly performed their duty, still, as it had not been satisfactorily made out that there ever were partnership assets, out of which the legacies could have been recovered or secured, the executors ought not to be charged with wilful default.¹

Executors are not chargeable with the value of their testator's property, as stated by himself and others in deeds to which the executors are not parties. *Infra*, at p. 770.

¹ See *Stanton v. Percival*, 5 House of Lords Cases, 257, 266.

THESE appeals were brought against orders made in suits, the object of which was to obtain payment of two legacies of 12,000*l.* each, which were bequeathed by Mr. Henry Wyatt, the testator in the causes, in *trust for the benefit of his daugh- *727
ters and three children. It was alleged by the appellants in the first appeal, the children of the daughters, that the testator's personal assets were, at his death, amply sufficient for payment of the legacies, but were afterwards wasted and lost; and they charged that the loss was occasioned by the neglect and default of Adams and Marks, the respondents in that appeal, who were the executors of the testator, and that they, therefore, became personally liable to make good the amount of the two legacies, with interest.

In April, 1817, Mr. Henry Wyatt, who had for some years previously carried on an extensive business as an ale brewer upon freehold and leasehold premises belonging to himself in Portpool Lane, took his eldest son Henry Earley Wyatt into partnership. Upon that occasion Mr. H. Wyatt's capital embarked in the business — exclusive of the debts due to him in respect thereof, and also exclusive of the value of the stock of malt, hops and ale belonging thereto — was estimated by him at 24,000*l.*, which sum had been from time to time expended upon, and was then represented by the plant, stock in trade, utensils and effects employed in the business, other than the debts and stock excepted from the estimate. By the articles of partnership — founded on the estimate — one-fourth part of the plant, &c. equal to 6000*l.*, was given to H. E. Wyatt, and he was to have one fourth of the profits, subject to the payment thereof of interest, at the rate of 5*l.* per cent. per annum, to his father, upon the said sum of 6000*l.* The articles contained various stipulations in respect to the drawing of bills and checks and the keeping of the accounts, &c. The trade debts and stock of malt, reserved by the articles as the exclusive property of Henry Wyatt, were *used in the *728
course of the business as surplus capital belonging to him, upon the amount of which, calculated from time to time, he was entitled under the articles to the like interest, and, for the repayment of such capital, the joint stock of the partnership, and the profits thereof, were made liable.

The business was carried on under the firm of "Wyatt and Son" from 1817 to the year 1825, during which time accounts of

the stock in trade, of the debts due from and to the firm, and of the profits of the business, were taken at the end of each year, and entered in books signed by both partners. Upon the footing and result of these accounts, at the end of 1824, the plant, utensils, and other effects employed in the business — exclusive of the debts due to the partnership, and of the stock of malt and ale in hand — were estimated by Henry Wyatt at the sum of 63,676*l.*, and there was then due to him from the concern, as the amount of his surplus capital therein, the sum of 48,915*l.*, and to Mr. H. E. Wyatt, the sum of 3129*l.*, as his surplus capital.

On the 1st of January, 1825, Mr. George Wyatt, second son of H. Wyatt, was taken into the partnership, and new articles of partnership for seven years from that date were executed; and it was thereby agreed, among other things, that the plant, utensils, horses, carts, and other effects employed in the business, estimated at 63,676*l.*, — exclusive of the stock of malt, &c. then on hand, and of the debts due to the late partnership, which were to continue the property of H. Wyatt and H. Earley Wyatt respectively, and exclusive also of the said surplus monies of 48,915*l.* and 3129*l.* due to them respectively from the business, — should be the capital of the new partnership, and should be in the proportion of one whole moiety thereof * to Henry Wyatt, and one fourth to each of his said sons; that H. Wyatt and H. Earley Wyatt should be entitled to receive interest of 5*l.* per cent. per annum out of the general profits of the business on their said respective surplus capitals; and that out of George Wyatt's share of the profits, H. Wyatt should be entitled to receive interest of 3*l.* per cent. per annum on the sum of 15,919*l.*, the estimated value of G. Wyatt's fourth part of the general capital. Upon the footing of these articles, which contained various other stipulations usual in partnerships, the business was carried on under the firm of "Wyatt and Sons," from January, 1825, to July, 1826, when Mr. H. Wyatt died.

Mr. Henry Wyatt, by his will, dated in June, 1826, gave and bequeathed to Hannah Wyatt, his wife, and to the respondents, Samuel Adams and Edmund Marks, their executors and administrators, all such surplus capital and accrued interest thereon, as he should at his decease have in the said business, over and above his stipulated proportion of capital therein, and also all his government stocks, and other stocks or funds in the will mentioned, upon

trust to invest the same surplus capital in their names in government stocks, or in real securities, and to stand possessed thereof upon trust during his wife's life, to pay her the dividends and annual produce of the same surplus capital, stocks, funds, and securities, for her sole and separate use; and after her decease, upon further trust, out of the same surplus capital, stocks, &c. as the primary fund, to set apart the two several legacies of 12,000*l.* thereafter bequeathed for the benefit of his two daughters and their respective children; and as to the then residue of the same surplus capital, stocks, &c. upon trust for his two sons, George and William, in equal shares, as tenants in common, their respective shares * to be paid, or transferred to *730 them respectively, at their respective ages of twenty-one years, or so soon thereafter as the decease of his wife would permit.

He devised and bequeathed all his copyhold messuages, lands, &c. situate at Hornsey (exempt from his debts and funeral and testamentary expenses), to his wife, for her life, for her separate use; and from and after her decease, he devised and bequeathed the same to his son George, to hold to him, his heirs and assigns for ever, according to the custom of the manor. And he devised and bequeathed his freehold houses, messuages, tenements, &c. in Tash Street, Gray's Inn Lane (exempt from his debts and funeral and testamentary expenses), to his wife, for her life, for her separate use; and from and after her decease, he devised and bequeathed the same to his son William, his heirs and assigns for ever. And he gave and bequeathed all his share and interest in the brewhouse, and in the plant, stock in trade, and all other chattels and things used in carrying on his said business, and the good will thereof, and in the stipulated ordinary capital for carrying on the said business (charged nevertheless with such of his debts and funeral and testamentary expenses as his residuary personal estate should not extend to pay, and with his legacies and the annual sum thereafter charged thereupon in favour of his wife); as to one moiety of his half part thereof—being one-fourth part of the entirety of the said business—to and for the use of his son William; and as to the remaining moiety, being the remaining fourth part of the entirety of the said business, to and for the use of his two sons, George and William, in equal shares, as tenants in common.

And he directed and required his executrix and executors to concur in carrying on and managing his said * business, in conjunction with his sons for the time being of full age, on behalf of his son William, until he should attain his age; and he further directed that during his minority 200*l.* a-year should be paid to his guardians out of the annual profits of his share, to be applied to his maintenance; and that the residue of the annual profits of his share should, from time to time, be invested by his said wife, S. Adams and E. Marks, or the survivors or survivor of them, in government stocks or funds, and should be added to, and be subject to the same limitations as, the said share from which such accumulations should arise.

And he gave all the residue of his goods, chattels, and personal estate (subject to his debts and funeral and testamentary expenses, and the deficiency of his legacies) unto his said wife and Adams and Marks, upon trust to convert the same into money, and invest it in government stocks or funds in their names; and to stand possessed of the same residuary personal estate, and the stocks, funds, and securities in which the same should be invested, upon trust during his wife's life, to pay her the dividends and annual produce thereof for her separate use; and from and after her decease, then as to the same residuary personal estate, stocks, funds, and securities, in trust for his said two sons, George and William, and his two daughters, in equal shares, as tenants in common; the share therein of each of his daughters to be held upon the like trusts as her legacy of 12,000*l.*

And he gave and bequeathed the sum of 12,000*l.*, from and after the decease of his wife, unto the said Adams and Marks, and the survivor of them, upon trust to invest the same in government stocks or funds; and to stand possessed thereof upon trust to pay the dividends to his daughter Caroline, the wife of William * 732 * Orchard, during her life, for her separate use and without anticipation; and from and after her decease upon trust for her children, equally to be divided among them, and to be vested and paid or transferred at such times as in the will mentioned; and he gave and bequeathed unto the said Adams and Marks, their executors, &c. from and after his wife's decease, the further sum of 12,000*l.* upon the like trusts, for his other daughter Jane, the wife of Thomas Rowley, and her children.

And he empowered the guardians of his son William, during

his minority, at their discretion, to sell and dispose of his share of his business of a brewer, and the good will thereof, to his brother or brothers, or any other person whomsoever. And he devised and bequeathed all his three-fourth parts in his stabling and warehouse in White Hart Yard, Portpool Lane (subject to such of his debts and funeral and testamentary expenses as his residuary personal estate should not extend to pay, and to his legacies), unto and to the use of his son H. E. Wyatt, his heirs and assigns for ever. And he gave, devised, and bequeathed all his freehold and leasehold premises in Portpool Lane, being his brewhouse and other premises held and occupied therewith (subject to his debts, and to his legacies) unto the said Adams and Marks, their executors, assigns, &c. upon trust as to the freehold, to the use of his son William, his heirs and assigns, when he should attain twenty-one; and as to the leasehold part thereof, to him, his executors, administrators, and assigns, for the remainder of the unexpired term therein. And he declared that all the freehold and other property whatsoever, devised and bequeathed as aforesaid, was so devised and bequeathed subject to the payment of the surplus *capital, continued or lent in the said business, and *733 the interest for the same. And he also subjected and charged all his copyhold and freehold estates respectively, and also his residuary personal estate, with payment of the said two sums of 12,000*l.* and 12,000*l.* to his two daughters, and directed that interest, after the rate of 5*l.* per cent. per annum, should be paid thereon respectively, until the same should be respectively invested as aforesaid, from the day of the decease of his said wife. And he directed that his sons and all necessary parties should, whenever thereunto required, and which he directed might be done, duly execute mortgages to his said trustees of his said copyhold and freehold estates for securing the payment of the said two principal sums, with interest for the same, after the rate aforesaid, and all expenses incurred in and about the same, within two years from the day of his decease, in which mortgages should be contained the usual powers of sale, &c. And he appointed his wife, and in case of her death or second marriage, the said S. Adams and E. Marks, guardians of the said William Wyatt, until he should attain the age of twenty-one years; and he also appointed his wife and them executrix and executors of his will.

On the testator's death, his sons, H. Earley Wyatt and George

Wyatt, and his widow, Mrs. Hannah Wyatt, respectively entered into the possession of the freehold, copyhold and leasehold estates, devised to or in trust for them respectively, and his said two sons continued in possession of the partnership property and effects.

The widow died in April, 1827, whereupon G. Wyatt was admitted to the copyhold estates at Hornsey, which he afterwards settled on his wife in fee. The * testator's will was not proved by Adams and Marks until December, 1827, in consequence of a protracted opposition thereto by H. Earley Wyatt.

From the death of the testator until 1828, his sons H. E. Wyatt and G. Wyatt continued to carry on the business with the concurrence of Adams and Marks, and they (the sons) collected the debts owing to the brewery, and consumed the stock of beer, malt and hops, in the ordinary course of business. Differences having soon arisen between them, and continued up to the end of 1827, an arrangement was then entered into for the retirement of H. E. Wyatt from the business, upon the terms of his receiving from George the sum of 20,000*l.* for his one-fourth part of the capital and business, and being released by the executors of the testator from all claims in respect of his estate. This arrangement, after much negotiation, was concluded in January, 1828, by two deeds of assignment and dissolution of partnership.

The deed of assignment was made between H. E. Wyatt of the first part, Adams and Marks, as the surviving executors of H. Wyatt, of the second part, and G. Wyatt of the third part; and it recited the articles of copartnership of 1817, a deed of conveyance, dated 7th March, 1820, whereby the White Horse public-house and other freehold hereditaments were conveyed to H. Wyatt and H. E. Wyatt in fee, as part of their copartnership property, and the articles of copartnership of 1825; and then recited that the statements contained in the last-mentioned articles with respect to the value of the plant, utensils, stock, &c. employed in the business, and with respect to the amount of surplus money then due therefrom to H. Wyatt, were untrue, and that since his *735 death the * business had been carried on by H. E. Wyatt and G. Wyatt, for the benefit of themselves and the persons interested therein under the will of the testator, and that G. Wyatt had, with the consent of Adams and Marks, as executors

and trustees of the testator, contracted with H. E. Wyatt for the absolute purchase of his fourth part or share of the good will of the business and of the partnership property, and also of all such surplus capital as H. E. Wyatt had in the business ; and it further recited that it had been stipulated by H. E. Wyatt, and agreed to by G. Wyatt, with the consent of Adams and Marks, as such trustees and executors, that G. Wyatt should pay and discharge the fourth part which ought to be paid by H. E. Wyatt (in respect of his one equal fourth part) of such surplus capital as should be found to have belonged to H. Wyatt at the time of his decease, and of all other debts or engagements of the said copartnerships, and should indemnify H. E. Wyatt from the same ; and that it had been also stipulated that Adams and Marks, as such executors as aforesaid, and in their separate capacities respectively, should release H. E. Wyatt from all claims whatsoever in respect of such surplus capital and other sums due to the estate of H. Wyatt, and also from all debts due by H. E. Wyatt and G. Wyatt, as surviving partners, to Adams and Marks respectively, for malt or other goods sold by them for carrying on the said trade since the decease of H. Wyatt, and should execute the declarations thereafter contained as to the sum in the partnership articles of 1825, stated to be the value of the plant, utensils, &c. then belonging to and employed in the said business, and as to the sum stated to be the amount of surplus money then due from the business to H.

Wyatt ; and it further * recited that it had been ascertained * 736 that the fourth part of the said surplus capital of H. Wyatt, and of the other debts and engagements of the copartnership of 1825, or of H. E. Wyatt and G. Wyatt, or either, as surviving partners in respect of the said business, did not amount to 29,500*l*.

The deed witnessed, that in consideration of 5000*l*. then paid by G. Wyatt to H. E. Wyatt, and also of 15,000*l*. and interest secured to be paid by the same to the same, in the manner therein mentioned, H. E. Wyatt (with the consent and approbation of Adams and Marks, as such executors as aforesaid), sold and assigned to G. Wyatt all his one equal fourth part or share of the good will of the business of ale brewer, and of the profits thereof ; and of the plant, utensils, &c. used in or about the said business ; and of all monies, debts, credits, bills, and securities then due in respect of the said business, and of the principal money, interest,

profit or advantage arisen or to arise on or from the said securities, or any of them; and of all ordinary capital employed in or about the said copartnerships, and also all surplus capital belonging to H. E. Wyatt, and then remaining in the said business, &c.

And it further witnessed, that G. Wyatt covenanted with H. E. Wyatt to pay the fourth part, to any extent not amounting to 29,500*l.*, which ought to be paid by H. E. Wyatt, of all such surplus capital as, on taking the partnership accounts, should be found to have belonged to H. Wyatt at the time of his death, and of all other debts and engagements due from the copartnership, or from H. E. Wyatt and G. Wyatt, or either of them, as surviving partners, in respect of the business carried on up to the death of

H. Wyatt, and since his decease. And it further wit-

*737 nessed, that *Adams and Marks, with the approbation of

G. Wyatt (and so far only as they rightfully might), released, and discharged H. E. Wyatt from all claims and demands which they, Adams and Marks, as executors or otherwise, could make against him in respect of any surplus capital or sum of money whatsoever, in any wise due from the said copartnerships, or from H. E. Wyatt and G. Wyatt, as surviving partners, or from H. E. Wyatt, in respect of the said business, but not so as to discharge the capital or joint stock then remaining in the business, or G. Wyatt, from the same or any part thereof. And Adams and Marks, and G. Wyatt severally declared and acknowledged, that the sum of 63,676*l.* mentioned in the articles of copartnership of 1825, as the value of the plant, utensils, &c. was a false and erroneous sum, and far surpassed the actual value of the same, and that no valuation was in fact made thereof, and that the aforesaid sum was erroneously inserted therein; and further, that the sum of 48,915*l.*, in the same articles mentioned as the amount of surplus capital then due from the business to H. Wyatt, was also an erroneous sum, and greatly surpassed the amount of his surplus pecuniary capital therein, and that no account was then made or taken thereof, and that the said last-mentioned sum was in like manner erroneously inserted in the said articles by the said H. Wyatt.

By the deed of dissolution of partnership, of the same date, and made by and between the same parties, — after reciting, among other things before stated, the articles of partnership of 1825, and

the will of the said testator, and that the same had then lately been proved by Adams and Marks, and also reciting the said contract of sale of H. E. Wyatt's share in the said business ;— it * was witnessed, that in consideration of the premises, * 738 they, H. E. and G. Wyatt, and Adams and Marks as trustees and executors, dissolved the copartnership subsisting between them under the recited articles of 1825, or otherwise, so far only as concerned H. E. Wyatt ; and thereby declared and agreed that the same, so far only as concerned him, should as from that date cease and determine. And it was thereby further witnessed that H. E. Wyatt released and discharged G. Wyatt, his heirs, and executors, and the said Adams and Marks, their heirs, and executors, and the estate and effects of the said H. Wyatt, from all actions, claims, and demands which he, H. E. Wyatt, his executors, &c. might have or make against G. Wyatt, his heirs, or executors, or the estate or effects of H. Wyatt, by means or in consequence of G. Wyatt or H. E. Wyatt, or Adams and Marks as trustees and executors, having been partners in the said copartnership, or in respect of any act done by them or any of them in or about the said copartnership. Then followed a similar release and discharge of H. E. Wyatt from all claims by G. Wyatt, and by Adams and Marks.

A notice signed by the four, " that the partnership formerly subsisting between H. Wyatt the elder, and his sons, H. E. Wyatt and G. Wyatt, of Portpool Lane, brewers, and the partnership carried on since his death by the undersigned, had been dissolved, by mutual consent, on the 1st of January, 1828, so far as regarded H. E. Wyatt, who retired from the business, and that all persons indebted to either of the firms were to pay their bills to G. Wyatt, by whom all debts due to the said firm were to be paid," was published in the London Gazette.

On the retirement of H. E. Wyatt, G. Wyatt, with * the * 739 concurrence of Adams and Marks, continued to carry on the business until November, 1829, when he formed a partnership with Mr. Henry Thompson, who entered into an agreement with Adams and Marks as executors of H. Wyatt to purchase his moiety of the brewery and of the good will thereof, and of the plant and stock in trade thereto belonging, and of the debts due thereto, at a price to be ascertained by two valuers.

The new partners, H. Thompson and G. Wyatt, agreed, on the

completion of the valuation, to pay the amount thereof to Adams and Marks as executors of H. Wyatt, and to enter into a bond to pay all the debts that would be found due from the former firm, and to indemnify the executors against them; but in case the debts should be found to exceed the value of the whole brewery property, G. Wyatt, and Adams and Marks, and William Wyatt, who was then of full age and a party to this agreement, were to bear such excess in the proportion in which they were respectively entitled to the property.

Upon the investigation then made into the accounts of the partnership, it was found to be in an insolvent state, its liabilities exceeding its effects to the extent of more than 7000*l.* The business was, however, carried on by G. Wyatt and Henry Thompson; the agreement for sale of the testator's moiety to the latter having been confirmed by the Court (*infra*, at p. 742).

Interest had been paid on the two legacies of 12,000*l.* up to April, 1829, but, with this exception, no sum was ever paid in respect either of principal or interest.

From the death of the testator till November, 1829, Adams, who was a malster, and Marks, who was a hop factor, continued to supply the brewery with malt and hops, as they had done in the lifetime of the testator. Throughout this period they were in the habit of attending at the brewery once or twice a week, but
 * 740 in no * way interfered with, or gave any orders or directions with respect to the management of the business, or the collection of the testator's assets.

The legatees of the two 12,000*l.*, Mr. and Mrs. Orchard, and Mr. and Mrs. Rowley, had, in 1837, filed a bill in Chancery against H. E. Wyatt and G. Wyatt, Adams and Marks, and W. Wyatt, then an infant, stating, among other things, that under the articles of partnership there was owing from the concern to the testator, at the time of his death, as well the sum of 48,915*l.* 5*s.* 10*d.* surplus capital, his exclusive property, as several other sums of money from time to time subsequently brought into the concern by him in increase of its capital, and other large sums applied for that purpose out of the profits of the partnership, which the testator suffered to remain in the concern; and stating that H. E. Wyatt and G. Wyatt had since the testator's death carried on the said business, and employed therein the said surplus capital and other sums of money belonging to the testator; and that great differences and

animosity existed between them, and that they had no communication with each other upon the affairs of the said business, and greatly neglected the same, and that no proper written accounts were kept of the dealings, or of the monies received and paid on account of the business, by reason whereof the estate and effects of the testator embarked therein were in great danger of being lost; and that H. E. Wyatt had applied the monies received by him to his private purposes.

The bill charged that the defendants were not entitled to employ the capital belonging to the testator in the said business, for that the late copartnership was determined by his death, and thereupon the affairs thereof should have been wound up, and a balance * struck, which the plaintiffs charged had not been * 741 done; and they further charged, that if the defendants were so entitled as aforesaid (which the plaintiffs did not admit), yet that the said business should be conducted with the greatest care, and under the superintendence of some trustworthy and skilful person; and that from want of proper attention great loss was likely to accrue to the plaintiffs and all persons interested in the estate of the testator, and that the same ought therefore to be secured for the benefit of the parties entitled thereto. The bill prayed that the will of the testator might be established, and the trusts thereof carried into execution; that accounts might be taken of the partnership dealings and transactions between the testator and H. E. Wyatt and G. Wyatt, and of the dealings of H. E. Wyatt and G. Wyatt in the said business, &c.; also that a receiver might be appointed and an injunction granted against H. E. and G. Wyatt's disposing of any of the partnership estate.

This bill was dismissed with consent of the plaintiffs, at the suggestion of the executors, and with a view to the arrangement for the retirement of H. E. Wyatt from the business, which all the parties were desirous to facilitate.

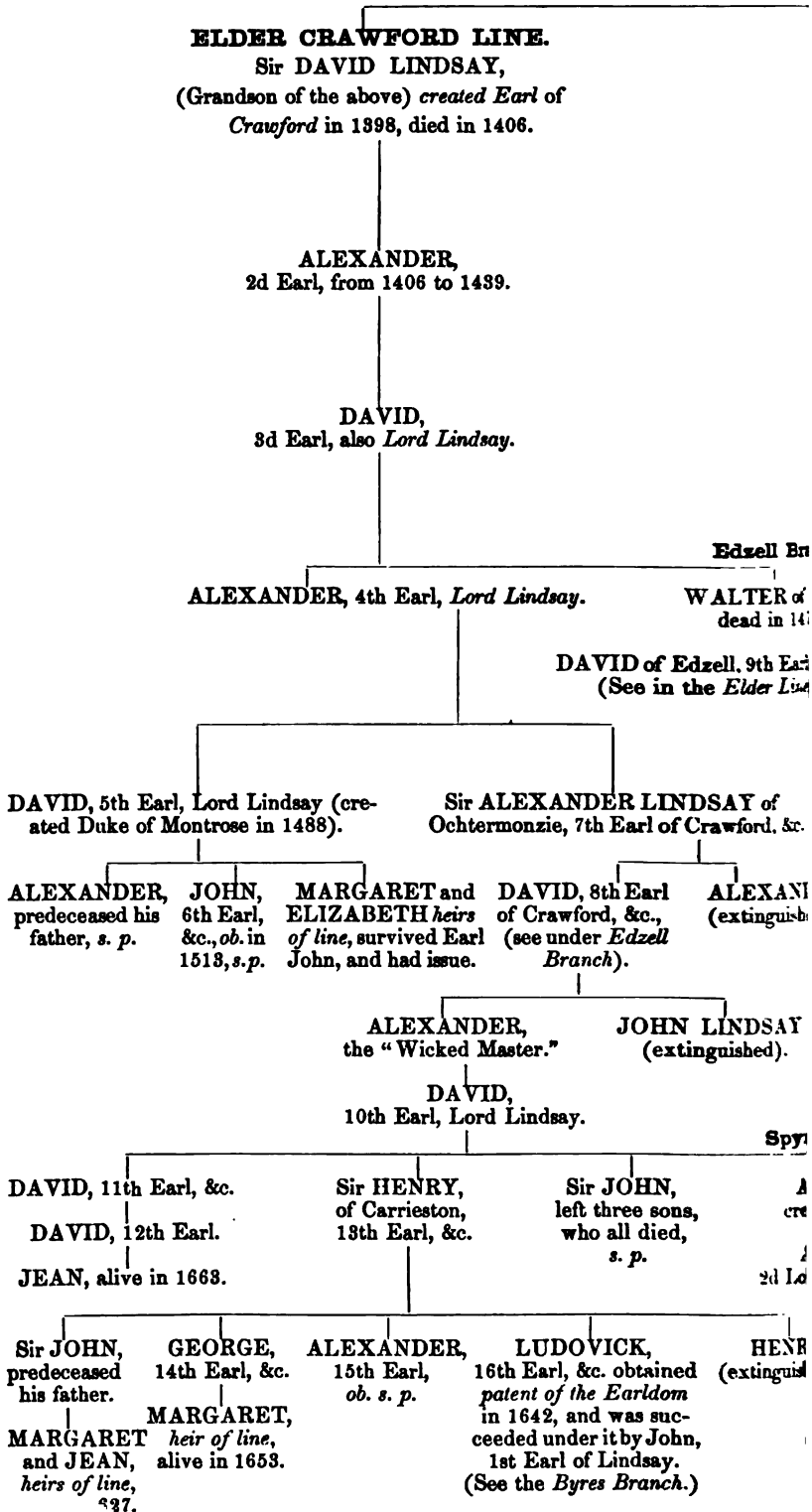
No steps having been taken by the executors to secure the testator's property in the business, or to ascertain what was owing from the business to his estate, which, after the retirement of H. E. Wyatt, was left on the personal credit of G. Wyatt, a second bill in Chancery was filed in July, 1829, by Mr. and Mrs. Rowley and Mr. and Mrs. Orchard against the same defendants and the children of the plaintiffs, praying that the said will might be established, and the trusts thereof declared and carried into effect, and

*742 *that an account might be taken of the testator's personal estate and effects, by his will charged with the legacies of 12,000*l.* and 12,000*l.*, possessed by or come to the hands of the said defendants, or any of them; and that the same might be applied in a due course of administration, in satisfaction of the said legacies; and that all necessary accounts might be taken, and a receiver and manager of the business appointed; and in the mean time that H. E. Wyatt, G. Wyatt, and W. Wyatt might be ordered to execute mortgages to secure the said legacies, as by the will directed.

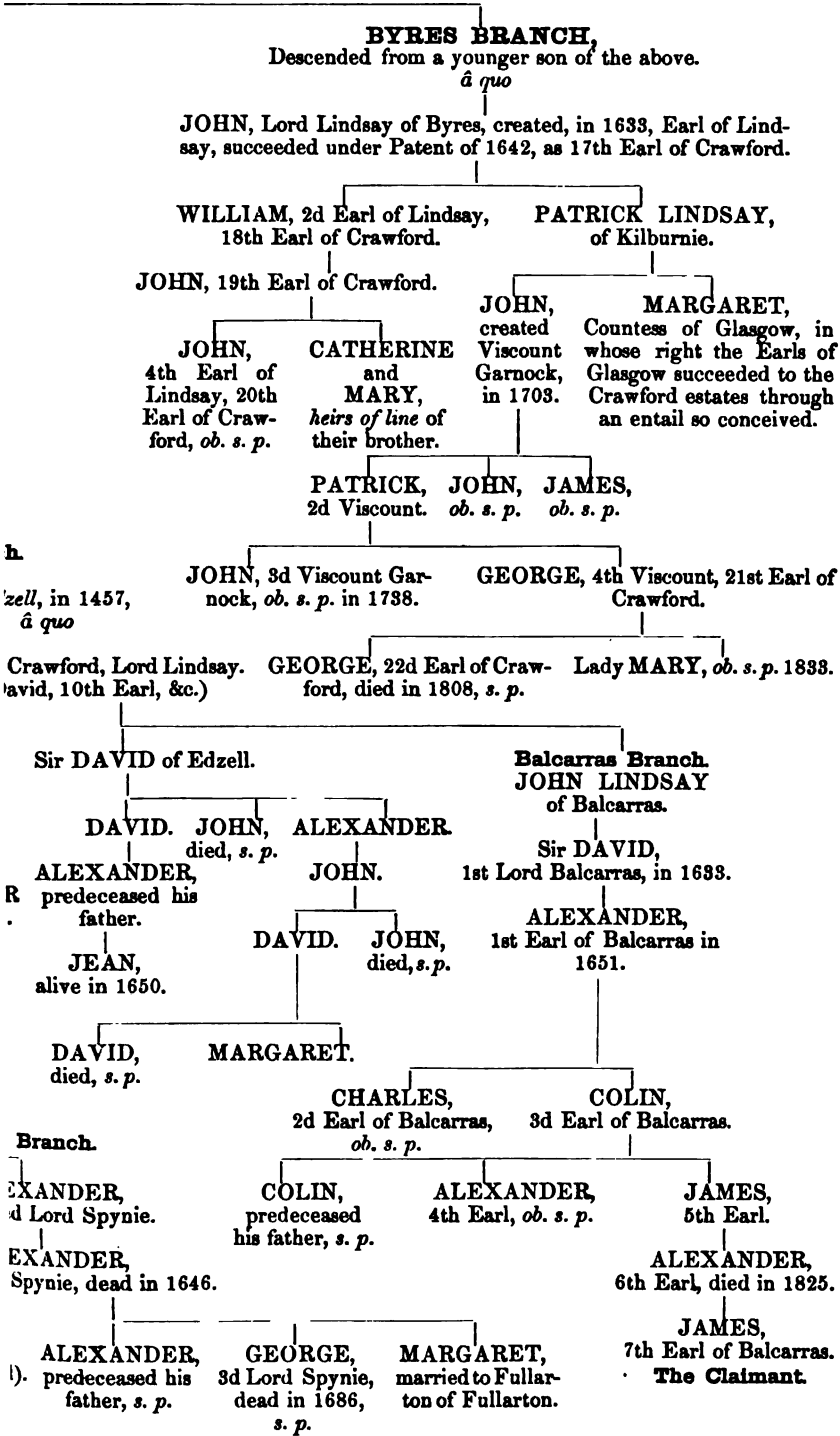
The answer of the executors to this bill did not contain any suggestion of the embarrassment or insolvency of the concern, although they were then in possession of the valuation thereof, made in the proposal of taking H. Thompson into partnership. On their petition, presented in the cause, an order was made in November, 1829, whereby it was referred to the Master to inquire whether it would be beneficial to the parties interested in the estate of the testator that the agreement with H. Thompson should be carried into execution, and in April, 1830, the Master reported that it would. The report was confirmed by an order dated in May, 1830; and in pursuance thereof, debts due to the late partnership to the amount of 8810*l.* 3*s.* 4*d.* were transferred to the new firm of Wyatt and Thompson.

The cause came on to be heard upon bill and answers in July, 1830; but before any decree was drawn up, the plaintiffs having become aware of the insolvency of the brewery, did not further prosecute that suit.

In December, 1829, Adams and Marks filed their bill in Chancery against H. E. Wyatt, G. Wyatt, W. Wyatt, Thomas Rowley and his wife, William Orchard and his wife, and their respective children; and after *stating the will of H. Wyatt, and the opposition made by H. E. Wyatt to the proof thereof in the Ecclesiastical Court, and that he and G. Wyatt, the surviving partners, had possessed themselves of the whole of the partnership property, and they and W. Wyatt, Mr. and Mrs. Rowley, and Mr. and Mrs. Orchard had possessed themselves of other parts of the testator's property; the bill charged that the share and interest of the testator in the partnership concern amounted to a large sum, but that no accounts of the partnership had ever been settled, and that the testator's share and interest



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therein at the time of his death had not been properly ascertained ; that the *caveat* entered by H. E. Wyatt against proof of the will was entered for the purpose of preventing the executors from possessing themselves of the testator's personal estate and effects, and applying the same in a due course of administration, and in order to enable him to obtain the exclusive possession thereof for his own benefit. It further charged, that at the testator's death, there were at the brewery, and at his residence at Hornsey, mortgages, bonds, and securities for money, which had been taken and retained by the said defendants, and that in consequence of the disputes in the family there was great danger that the testator's outstanding estate, which the executors had been prevented from receiving, would be lost.

The bill prayed discovery from the defendants, and that the will might be established, and the trusts thereof carried into execution, and that accounts might be taken of the personal estate of the testator, and, in case the same should be insufficient to pay his debts and legacies, that an account might be taken of his real estates, charged with the payment of his legacies, and of the rents thereof, in the usual manner ; and that H. E. * Wyatt, G. * 744 Wyatt, and W. Wyatt might be directed to execute such mortgages and charges as by the will was directed for the better securing the said two legacies, and that a receiver might be appointed.

In January, 1831, the appellants in the original appeal, who are the children of Mr. and Mrs. Rowley, and of Mr. and Mrs. Orchard, filed their bill against the respondents, the executors, Adams and Marks, H. E. Wyatt and G. Wyatt and wife, making Mr. and Mrs. Orchard and Mr. and Mrs. Rowley parties defendants. The bill stated the said partnerships between the testator and his sons, and that the whole of the sum of 48,915*l.*, and other sums, were due to the testator from the partnership at the time of his death ; and, after stating his will and the entry of the *caveat* against probate thereof, it proceeded to allege neglect against the executors, in causing the suit in the Ecclesiastical Court to be delayed in consequence of pending negotiations between them and H. E. Wyatt and G. Wyatt, and others of the family ; and that the executors did not take any proper measures for securing the estate ; but that, with their permission, H. E. and G. Wyatt possessed themselves of the partnership effects, and received the outstanding debts, drew out large sums of

money, and applied the same to their own use; that on the testator's death, the partnership became dissolved as to him, and the accounts ought then to have been settled, and his surplus pecuniary capital ascertained, and raised out of the property then belonging to the partnership, and paid by H. E. and G. Wyatt, according to the partnership articles; and that at the testator's death the property of the partnership was much more than sufficient to

answer the amount of his surplus capital, and the same
 *745 might, if then called for, have * been immediately raised, and the executors ought to have raised or called for payment thereof, and to have invested the same upon the trusts of the will, but that they wholly neglected to do so, and no part of the testator's surplus capital, or of the two legacies, or of the residue of his personal estate, had been raised or invested.

The bill set forth the arrangement for H. E. Wyatt's retirement from the business, and the said deeds whereby that arrangement was carried into effect, and alleged that at the date thereof a large balance would, on a proper settlement of the accounts, have appeared to be due from H. E. Wyatt to the testator's estate; that the executors were not authorised to give him the release contained in the assignment, or to make the admission therein contained as to the testator's surplus capital, and that they were guilty of a breach of trust in so doing, and that the admission was made without any valuation having been made, and without any evidence of its truth, and the release given without any consideration, and without any benefit being thereby obtained to the testator's estate.

The bill, after alleging various acts of neglect and mismanagement against the defendants, whereby the business had been injured, and the value of its property greatly reduced, charged that H. E. and G. Wyatt, by executing the partnership articles of 1825, acknowledged that the sum of 48,915*l.* was due to the testator from the business as surplus capital, and were not at liberty to dispute the same; that they had the means of being and were fully acquainted with the true state of the partnership affairs and accounts, and in particular H. E. Wyatt, who had for several years managed the same; that the executors were not authorised to employ
 *746 * the testator's surplus capital in the business, or concur in carrying on the business, except as trustees for and at the risk of W. Wyatt during his minority.

The bill prayed that the will of the testator might be established,

and the trusts thereof carried into execution ; that accounts might be taken of the personal estate of the testator possessed or received by Adams and Marks, or which, without their default or neglect, might have been possessed ; and of the same estate possessed by H. E. Wyatt, G. Wyatt, W. Wyatt, and Hannah Wyatt (deceased), or any of them ; that Adams and Marks might be declared to be responsible for such parts of the personal estate as had been possessed by the other defendants with their privity or permission ; that the said two legacies of 12,000*l.* each might be raised in the manner provided for by the will, and for that purpose accounts might be taken of the dealings of the partnership from January, 1825, to the time of the testator's death, and of his surplus capital therein at his death ; and that in taking such accounts credit might be given to the testator's estate for the sum of 48,915*l.* and for the monies advanced by him to the business after the said date, with interest, and for certain rents of the premises as agreed to in the said articles, and also for his share of the partnership property ; and that it might be declared that such surplus capital was a debt due to the testator and a charge on the property and on the debts due to the partnership at the time of his death, and that the business might be wound up and the property and debts thereof sold and got in, and the proceeds applied in payment of such surplus capital and in raising the said legacies, and that it might be declared that Adams and Marks, H. E. Wyatt, G. Wyatt, and W. Wyatt, were responsible for such *diminution of *747 the value of the property and debts of the business as had taken place since the testator's death ; and that they, or some of them, might be decreed to make good the same, so far as might be requisite for raising the said legacies ; that the assignment of January, 1828, might be declared void as against the appellants, so far as it purported to be a release to H. E. Wyatt, or otherwise that Adams and Marks might be decreed to pay what he would, but for such release, have been liable to pay, and that his interest in the premises in Portpool Lane was subject to payment of what should be found due from them to the testator's estate ; and that it might also be declared that the freehold, copyhold, and leasehold estates of the testator, and the rents and profits thereof, possessed by the defendants respectively, were liable to the payment of the said legacies ; and that the same might be sold for that purpose, or that the defendants respectively might be decreed to execute

proper mortgage securities ; and the bill also prayed for a receiver and for an injunction.

The defendants Adams and Marks, by their joint and several answer, stated, among other things, by way of defence, that at the time of the formation of the partnership of "Wyatt and Sons," the testator had not any surplus capital in the trade, and that, if he had any, the sum of 48,915*l.* not only far exceeded the actual amount thereof, but was an imaginary sum stated by the testator, without any accounts of the trade being made for ascertaining his actual interest therein ; that he had withdrawn from the partnership various sums, and did not advance any thereto ; and that the stock of malt, &c. at the formation of the new partnership, and

the debts then due, and the plant and utensils, were estimated by the testator * without account or valuation, and that such estimate was very erroneous, and was made without taking into account the debts owing by the partnership ; that these defendants did not — except by giving instructions for valuation as preliminary to probate — act as executors until December, 1827, when probate was actually granted ; that in the mean time the surviving partners possessed themselves, as they had a right to do, of the partnership stock and effects, and these defendants did not actually take upon themselves the execution of the trusts of the will until January, 1828 ; that the arrangement by which H. E. Wyatt retired was made for enabling the executors to save some portion of the testator's estate, for that without such arrangement an adverse dissolution of the partnership between H. E. and G. Wyatt must have taken place, whereby a great loss would be occasioned to the testator's estate, and their object was that H. E. Wyatt should withdraw the caveat and permit the will to be proved ; and this arrangement was sanctioned by Mr. and Mrs. Orchard and Mr. and Mrs. Rowley.

The answer of H. E. Wyatt also stated that the sums of 63,676*l.* and 48,915*l.*, inserted in the partnership articles of 1825, were imaginary sums named by the testator, without any foundation in fact ; and that this defendant executed the said articles containing those alleged sums, under coercion of the testator.

The other defendants having put in their answers, and both causes being at issue, numerous witnesses were examined.

Several supplemental bills were afterwards filed, to bring before the Court the successively born children of Mr. and Mrs. Rowley,

and Mr. and Mrs. Orchard, *and the assignees of the firm *749 of Wyatt and Thompson, who had been declared bankrupts.

The causes were heard in April, 1832, by Sir J. Leach, then Master of the Rolls, who, by his decree of that date, declared that the said will be established, and the trusts thereof carried into execution ; and it was referred to the Master to inquire whether, on the 1st of January, 1825, the plant, utensils, &c. employed in the brewery business (exclusive of the malt and beer, and of the debts due to the preceding partnership) were of the value of 63,676*l.*, or of what other value ; and whether 48,915*l.* was then the amount of surplus money due from the said business to the testator or what other sum, and whether 3129*l.* was the amount of surplus due to H. E. Wyatt or what other sum ; and the Master was further to inquire what was, at the testator's death, the value of the plant, utensils, &c. employed in the said business ; and what was the amount of surplus money then due to him from the said business, with liberty to state special circumstances. And it was ordered that the receiver who had been appointed under orders previously made in this cause and the said cause of *Adams v. Wyatt*, over the freehold, copyhold, and leasehold estates devised to H. E. and George and W. Wyatt, be continued.

The Master made his report in 1835, and certified that certain books which had been used in the partnership business had not been produced before him, namely, the cash-book, bankers' pass-book, check-book, and two other books, in which were entered the annual accounts of the partnership for the year 1824, and which contained an account of the sums due to the partners as part of the annual accounts in each year, and two other books containing an account of * what each partner had drawn *750 out ; and, as to the inquiry whether on the 1st of January, 1825, the plant, utensils, &c. (exclusive of malt, &c. and of the debts due to the preceding partnership) were of the value of 63,676*l.* the Master found that it appeared by the partnership articles of 1825, that the several parties thereto admitted that at that time the plant, utensils, &c. (exclusive of the stock, and debts due to the preceding partnership), were estimated by H. Wyatt and H. E. Wyatt at the said sum, but in consequence of the non-production of the account books, he was unable to state the real value : and as to the inquiry whether 48,915*l.* was on the 1st of January, 1825, the amount of surplus monies due from

the business to H. Wyatt (the testator), and whether 3129*l.* was the amount of surplus due to H. E. Wyatt, the Master, after reviewing the several states of facts laid before him by the appellants and the executors and H. E. Wyatt, and after examining the evidence produced by the appellants, found that the partnership articles of 1825 were prepared from instructions given by the testator to his own solicitor, and were executed without the interference of any other solicitor, but there was no evidence to show that they were executed by H. E. Wyatt and G. Wyatt under coercion of their father. And the Master was of opinion that the three sums of 63,676*l.*, 48,915*l.* and 3129*l.* were inserted in the said partnership articles as the result of the partnership accounts up to December, 1824, made out under the direction of H. E. Wyatt, and entered in books signed by him and the testator, which books were, with others before mentioned, alleged to be lost, and were not produced to him: and he found that the said sums of 48,915*l.* and 3129*l.* were, on the 1st of

*751 *January, 1825, respectively due from the business to H.

Wyatt and H. E. Wyatt, and were by them considered as surplus capital; that these sums did not consist of monies or surplus capital over and above what was then employed in the business; that 13,000*l.*, part of said two sums, making together 52,044*l.*, was composed of improvements and additions made to the plant and stock subsequently to 1817, and 39,044*l.*, residue of said two sums, was composed of property of the first partnership, exclusive of plant, &c. except the additions; but in the absence of the said account books he was unable to state how the sums of 48,915*l.* and 3129*l.* were made up (save as aforesaid) or what was the amount of surplus money due to the testator and H. E. Wyatt on the 1st of January, 1825, save that it appeared that on that day there existed partnership property of the following particulars and value (exclusive of the value of the good will of the plant, &c. and of the money due from private customers for table-beer, and of the value of the malt, hops and corn then on hand), viz.

	£	s.	d.
Cash and bills unpaid at the bankers	3,283	17	9
Due for beer supplied to publicans	17,461	15	0
Loans to publicans	18,994	7	6
Value of beer at the brewery	8,574	0	0
	£48,314	0	3

all which he found to be the property of H. Wyatt and H. E. Wyatt, subject to such debts as were then due from them: and he found that the value of the stock of beer belonging to the partnership at the testator's death amounted to 7831*l.*; that the value of the plant, utensils, &c. amounted to 15,338*l.*; that the debts due from publicans (excluding loans) amounted *to *752 25,277*l.*; the debts due for table beer, to 1595*l.*; the amount of loans, due from publicans, to 16,693*l.*; the amount of cash at the bankers, to 2268*l.*, besides 1103*l.* in bills of exchange not arrived at maturity, but afterwards paid, making together about 70,000*l.*, without taking into account the stock of malt and hops, or the value of the good will: and he stated his opinion (with his reasons) why the good will of the business (which he found was worth at the testator's death 10,000*l.*) ought not to be taken into consideration: and he found that the partnership was then indebted to their bankers in the sum of 8000*l.*, which being deducted from the said 70,000*l.* left a clear surplus partnership property of the value of 62,000*l.* at the time of the testator's death. And as to the inquiry directed respecting the amount of the testator's surplus capital in the said business at his death, the Master found that the sum of 57,329*l.* was then due to him from the partnership; that it comprised the 48,915*l.* inserted in the partnership articles as surplus capital, with the addition of 9462*l.* afterwards brought into the concern, and interest and certain rents due to the testator; but the said sum of 57,329*l.* did not consist of monies or surplus capital over and above what was employed in the business; and the property liable to pay said sum was subject to the partnership debts; but in consequence of the non-production of the account books, he was unable to state, save as aforesaid, what was the amount of the testator's surplus capital at the time of his death.

The report was confirmed, and the causes came to be heard thereon and for further directions in January, 1836, before Sir C. C. Pepys, then Master of the Rolls, by whose order of that date it was ordered that the inquiries directed by the former decree should be further *prosecuted; and that if the Master *753 should be unable to take the accounts of the partnership dealings by reason of the non-production of books of account or other circumstances, he was to ascertain and state such circumstances, and to make a separate report thereof, the parties to be at

liberty to apply for such other order as should be necessary. And it was referred to the Master to take an account of the personal estate of the testator, not specifically bequeathed, come to the hands of Adams and Marks, and of Hannah Wyatt, the executors, and that what, on taking such account, should appear to have come to the hands of Adams should be answered by him personally, and what should appear to have come to the hands of Mrs. Wyatt, should be answered by Marks, or her executor, out of her assets. (Marks himself had been declared bankrupt.)

In pursuance of this order, the Master made a separate report in June, 1837, wherein he set forth the sums and items ascertained by his previous report; and — after noticing that none of the account books mentioned therein, nor any further accounts relating to the inquiry, were produced to him, and that the appellants had examined the defendants on interrogatories, but their examination did not afford him any information to assist him in taking the accounts of the dealings and transactions of the partnership, further than is before mentioned — he found, upon consideration of the former and additional evidence laid before him, that he could not take the said accounts, by reason of the non-production of the account books. The Master made his general report in May, 1838.

By an order made by Lord Langdale, M. R., on the 9th May, 1839, upon the hearing of the causes on further directions, *754 and on the Master's said report, and on *exceptions taken by Adams and Marks to the separate report, the exceptions were overruled, with costs; and it was ordered, among other things, that it be referred back to the Master to inquire by whom the property and effects of the partnership, existing at the death of the testator, were possessed and received, and how and by whom the same had been applied and disposed of, and what had become thereof; and that he should inquire whether the executors, with due diligence, and without their wilful default, might have possessed themselves out of the partnership property and for the testator's estate of a sufficient sum to pay and satisfy the legacies found (by the general report) due to the plaintiffs, or any and what part thereof: And in making the said inquiries he was to have regard to the findings in his several former reports, and he was to be at liberty to state any special circumstances as he should think fit, at the request of either party: And he was also to inquire

whether the testator was entitled to any real estates not devised by the will.

From this order, and from part of the order of January, 1836, the executors appealed to the Lord Chancellor, and by the order made on the hearing of that appeal in August, 1841, the latter order was affirmed, and the former was varied so far only as by directing the consideration of all further directions and of costs to be reserved until after the Master's general report.

The Master made his report in December, 1843, and thereafter referring to the states of facts laid before him, and to the evidence produced in support thereof by the appellants and the executors and H. E. Wyatt, and considering the partnership articles of 1825, and having regard to his three former reports, before stated — * he found, among other things before men- * 755 tioned, that the hops, which were on the premises at the testator's death and which were not included in his former finding, were of the value of 6243*l.*, which being added to the sum of 83,200*l.* (including the good will), found by the former reports (as now corrected) to have been the value of the property therein mentioned, made the gross sum of 89,443*l.*; that all the property, consisting of the various items in the reports mentioned, was from the testator's death left to the undisturbed collection and use of H. E. Wyatt and G. Wyatt in the ordinary course of their trade: And he found that the partnership debts at the testator's death were 39,749*l.*, all which were since paid: And he found, on consideration of the several states of facts, and the evidence that was laid before him, that there were sufficient assets of the partnership existing at the death of the testator for the payment of the said legacies, and that the executors, with due diligence, and without their wilful default, might have possessed themselves, out of the partnership property and for the testator's estate, of a sufficient sum to pay and satisfy them, or that they might with due diligence, and without their wilful default, have secured out of such property and for the testator's estate, a sum sufficient for the payment of the said legacies: And he further found that the testator was in possession of three fourths of the house and premises in Portpool Lane, purchased by him and H. E. Wyatt in 1820, out of their partnership property, and that they were not devised by the will, but descended to H. E. Wyatt as his heir at law.

The respondents, Adams and Marks, took twenty exceptions to

the report, the first of which applied to the finding with regard to the sufficiency of the assets at * the testator's death ; and the second and third as to the finding of wilful default of the executors ; the fourth exception controverted the findings as to the value of the hops ; the twentieth exception applied to the last finding respecting the house and premises in Portpool Lane ; and the others controverted the findings as to other parts of the partnership property, stated in the report to amount, at the testator's death, to the gross sum of 89,443*l.* minus 39,749*l.* of debts.

The cause came on to be heard on the exceptions and for further directions on the Master's last report, in March and in May, 1844, before the Master of the Rolls, and by his Lordship's order, made in April, 1845, the first, second, and fourth exceptions were allowed, and all the others were overruled, and his Lordship declared that the legatees of 12,000*l.* and 12,000*l.* were entitled to have all the freehold and copyhold estates of the testator sold for payment thereof, but without prejudice to their claim on the primary fund against any parties who might be answerable for the same.¹

The original appeal was brought, first, against so much of the order of May, 1839, and August, 1841, as directed further inquiries relating to the partnership property and the wilful default of the executors, on the ground that the Court ought to have declared them, without any such inquiry, to have committed wilful default, and to be personally liable to make good the said legacies in case of insufficiency of assets of the testator ; and, secondly, against the order of May, 1845, so far as it allowed the first, second, and fourth of the executors' exceptions.

The second or cross appeal was brought by the executors, * 757 * against so much of the last-mentioned order as overruled the seventeen exceptions.

The third appeal, brought by William Wyatt, did not materially differ from the first appeal, except in submitting that the inquiries, directed by the order of May, 1839, ought to be more extensive, and that from the order of May, 1845, ought to be omitted the last declaration, that all the testator's freehold and copyhold estates ought to be sold, to make good the deficiency of the personal estate for payment of the two legacies.

¹ See his Lordship's Judgment, 7 Beavan, 396.

Mr. Bethell and *Mr. J. Parker* (*Mr. Erskine* was with them) for the appellants in the first appeal.

It has been established by the evidence and by the findings of the Master thereon, that the testator's property engaged in the brewery business at the time of his death was amply sufficient for the payment of the two legacies, and that the executors might have easily obtained the means of paying them if they had duly performed the trusts of the will. They, on various occasions, and especially in the arrangement effected with H. E. Wyatt in January, 1828, represented the testator's property then engaged in the business to be, and throughout dealt with it as being, much more than sufficient to answer the legacies, which therefore ought to be taken without any further proofs, as against the executors, to have been the case; but the fact has been proved and established in the cause, and all the difficulty which has been experienced was the difficulty of ascertaining the amount and particulars of the property, and that was entirely owing to the neglect of the executors themselves, in omitting to take proper accounts in the first instance. That difficulty, therefore, ought not to be a protection to them. It appeared *quite clear that the *758 executors, after taking upon themselves the burthen of the trusts of the will, abandoned and wholly neglected their duties, and took no steps whatever for obtaining the means of payment of the legacies and securing the testator's property. They were not only guilty of neglect, but committed a breach of trust by executing the indentures of January, 1828, and concurring in the arrangement thereby effected, and especially by releasing Mr. H. E. Wyatt from all claims in respect of the testator's estate.

The executors were guilty of improper and unnecessary delay in obtaining probate of the will, and during that delay they permitted the property available for the payment of the legacies to remain embarked in the brewery business, whereby it was — as they now in effect admitted — wasted and lost. The known misconduct of Henry E. Wyatt and George Wyatt with respect to the business, and the unfortunate dissensions between them, peculiarly called for the active interference of the executors, and rendered it their duty to apply to a Court of Equity for the appointment of a receiver, if, as they now contend, they were prevented by the proceedings of Henry E. Wyatt from obtaining probate at an earlier period. It was, upon the whole, very evident that at the date of

the order of May, 1839, it had been sufficiently proved that the executors, with due diligence and but for their wilful default, might have possessed themselves, out of the partnership property and from the testator's estate, of a sufficient sum to answer and pay the legacies. The inquiries, therefore, on that subject directed by that order were unnecessary, and ought not to have been directed, although the result of them has been that the case against the executors has been strengthened. The order of * 759 May, 1845, * allowing the three exceptions, was inconsistent with the former orders, and with the evidence and the findings of the Master thereon. Those exceptions ought to be overruled as well as the seventeen others that had been taken to the report.

Mr. Turner and Mr. Rolt (Mr. W. T. S. Daniel was with them) for Mr. Adams, the solvent executor, as a respondent in the first appeal, supported the order of the Master of the Rolls of May, 1839, and the Lord Chancellor's order of 1841, affirming the same, and also so much of the order of April, 1845, as allowed three of the exceptions taken by the executors. They submitted that there was no ground for charging the executors with wilful default or want of diligence; that it was evident from the evidence, and from the whole proceedings in the causes, that there never were sufficient assets of the testator to pay the legacies; that the testator was mistaken in his estimate of the value of the brewery property; and that the sums inserted in the articles of 1825 as general capital, and as separate surplus capital belonging to the testator, were imaginary estimates, and not founded on any valuation or accounts taken. At all events, the executors did not possess themselves of any of the assets of the testator; it was not indeed charged that they did, but the charge against them was that with due diligence, and without their wilful default, they might have possessed or secured a sufficient share of the testator's property to answer the legacies. They had no right to interfere at all with the brewery as executors until they obtained probate. The two surviving partners were in rightful possession of the partnership property. Henry Earley Wyatt disputed his father's will, and entered a caveat against the proceeding for probate, which was not * 760 * obtained until nearly eighteen months after the testator's death — until, in fact, he was purchased out of the brewery concern. That concern would have been ruined if the executors

had taken adverse possession. The question, therefore, now for consideration was, whether the executors exercised a sound discretion in not interfering sooner? The general principle was, that an executor or trustee is not justified in interfering in the management of trust property, if such interference would lead to the destruction or danger of the property. This principle was laid down in the clearest terms by Lord Lyndhurst in *Ward v. Ward*,¹ in 1843, and previously by Lord Cottenham, when Master of the Rolls, in the case of *Buxton v. Buxton*.² The conduct of these executors fell within the principle of those cases. With respect to the release of H. E. Wyatt by the executors, they conceived that if they refused to join in that, the concern would be destroyed, and they could not acquire any title to act, on account of his opposition to the probate. Sir John Leach, in his judgment in 1832, refused to charge them with any default on that account, and in effect negatived all the imputations cast on them by the appellants; and, in 1835-6, when the causes were before Lord Cottenham at the Rolls, he refused to charge them with a breach of trust.

It should be remembered that Mr. Adams is the sole respondent, Marks having been declared a bankrupt. It was imputed to Adams, as a motive for his non-interference, that he was a maltster, and supplied malt to the concern at high prices. But it was because Adams understood the business that the testator appointed * him executor; and it could not be supposed it * 761 was intended that he should no longer supply the malt; *Smith v. Langford*.³ Mr. and Mrs. Rowley, and Mr. and Mrs. Orchard, the appellants' parents, when they abandoned their bill, filed in 1827, must have considered that the executors were blameless. That may not be conclusive, but it was certainly an acquiescence in their conduct; and, as Lord Cottenham observed in the case of *Viscount Lorton v. The Earl of Kingston*,⁴ it would be contrary to all principle not to consider that as an important fact; particularly where the parties litigant had similar interests with the present litigants, and they abandoned their bill.

With respect to the cross appeal brought by the executors, the learned counsel submitted that the order of April, 1845, so far as it overruled the seventeen out of their twenty exceptions, and

¹ MSS. Vide infra, p. 777.

² 2 Beavan, 362.

³ 1 Mylne & Craig, 80.

⁴ 5 Clark & Finnelly, at p. 335.

refused them any portion of their costs, ought to be reversed; because the findings of the Master as to the value of the several items of property, enumerated in his report, were not warranted by the evidence and states of facts laid before him; and inasmuch as the appellants, in seeking to charge them beyond their actual receipts, had failed, they ought to be ordered to pay the costs. Whatever, however, may be the decision of the House upon this appeal, it cannot affect the right of the executors, as respondents in the original repeal.

Mr. Bethell, in reply, denied that Sir J. Leach or Lord Cottenham in their decisions in these causes at the Rolls acquitted the executors from liability in respect to the release in the deed of 1828.

*762 Lord Langdale, although he allowed three of their exceptions to the findings, in the Master's report, of neglect and wilful default, would not approve the proposition that they were not guilty of default. They unquestionably neglected their duty as trustees and executors in not making a timely valuation of the property. They not only did not themselves file a bill in proper time, but they interfered to stop the bill which was filed by the legatees in 1827. Had the executors filed a bill before probate, the Court of Chancery would order an account and a receiver to get in the estate pending the litigation for probate; *Atkinson v. Henshaw*.¹ The cases of *Buxton v. Buxton* and *Ward v. Ward* were different from this in their material circumstances, and the judgment of Lord Lyndhurst in the latter had no application to this case. (He read passages from that judgment.)²

Mr. Wray, for William Wyatt, the appellant in the third appeal, said he had a distinct interest from the appellants in the original appeal.³ He adopted all the arguments urged in their behalf, and asked their Lordships to remember his interests —

THE LORD CHANCELLOR. — His case is identical with that of the appellants in the original appeal. The rule of the House is that only two counsel are to be heard for appellants substantially having the same interest, unless by a previous arrangement, when some distinction is shown between the cases of the appellants.

¹ 2 Vesey & Beames, 85.

² *Supra*, p. 757.

³ *Infra*, p. 777.

Mr. Wray said he presented himself to the House at the proper time, and hoped that the interests of his client might be well considered.

July 27.

* LORD LANGDALE. — In the appeals of *Rowley v. Adams* *763 and *Adams v. Rowley*, my noble and learned friend, the Lord Chancellor, who was present during the argument, and attended very carefully to the subject, has formed his opinion upon it; but being unable, in consequence of indisposition, to attend the House, he has requested me to communicate to your Lordships that opinion, and the reasons for it, which are thus expressed in writing.

His Lordship then read as follows: —

“The appellants, the legatees, complain of an order made upon further directions by the present Master of the Rolls, dated the 9th of May, 1839, and of an order made by me in the Court of Chancery, affirming that order. They also complain of an order of the Master of the Rolls, dated the 7th of April, 1845, allowing three exceptions to the Master’s report, and upon further directions; and the appeal of the accounting parties (the executors) complains of the same order for having overruled other exceptions to the report taken by them.

“The complaint against the order of the 9th of May, 1839, cannot, I think, be supported.

“The 12,000*l.* legacies claimed by the appellants, being, by the testator’s will, first charged upon what he describes his surplus capital in his business of a brewer, Sir John Leach, Master of the Rolls, by his decree of the 28th of April, 1832, directed the Master to inquire whether such surplus capital amounted to 48,915*l.*, at which it had been stated in a certain deed executed by the testator and his sons; or what it did amount to. The Master reported that, owing to the non-production of books and accounts, he was unable to state what was the amount of the testator’s surplus capital. No exceptions were taken to that report; but the cause was *brought on before me at the Rolls, and by an *764 order of the 11th of January, 1836, I directed the Master to take an account of the partnership dealings; and if he found that he could not take such account by reason of the non-production of account books, he was to make a separate report of such

circumstances, and he was to take an account of the testator's real and personal estate, both of which were liable to the payment of the legacies, the surplus capital being first liable. The Master made a separate report, stating that, by reason of the non-production of the books of account, he could not take the account of the partnership dealings and transactions ; and that he had no means whatever of taking any accounts as between the individual partners.

“ The object of the directions in the decree of 1836 was that, if the Master should find that he could not, from the non-production of account books, take an account of the partnership dealings, he should make a separate report—in that case the Court might substitute some inquiries to attain, as far as possible, the same end, it being obvious that, without ascertaining by some means what was the amount of the testator's surplus capital, and what was his interest in the stipulated capital, it would be impossible to carry into effect the directions in his will as to the application of those funds in payment of the 12,000*l.* legacies. The plaintiffs, however, did not follow the course so provided for them, for without bringing this separate report under the consideration of the Court, they called upon the Master to make his general report, which he did ; the result of which is not material, except that it found that little, if any thing, was coming from the testator's general personal estate.

“ The defendants, however, the accounting parties, took * 765 exceptions to the Master's separate report, contending * that he might, without the books of account, to some extent, have taken an account of the partnership dealings, and that he ought to have examined the testator's sons as to the books. These exceptions were overruled by the present Master of the Rolls, and of that order there never was any complaint.

“ It stands, therefore, up to this point, established as between the parties, that the Master could not take any account of the partnership dealings, and, consequently, that he could not ascertain what was the amount of the testator's surplus capital, and what was the amount of his interest in the stipulated capital.

“ Under these circumstances, the cause again came on before the present Master of the Rolls, and by his order of the 9th of May, 1839, he referred it to the Master to inquire by whom the property and effects of the partnership, existing at the testator's

death, was possessed, and how it had been applied and disposed of, and what had become thereof; and he was to inquire whether the executors might not with due diligence, and but for their wilful default, have possessed themselves, out of the partnership property, for the testator's estate, of a sufficient sum to pay the legacies of 12,000*l.*, or any and what part thereof.

"This was a very favourable reference for the plaintiffs, the legatees, as it gave them the opportunity of bringing before the Master any proof of the existence of the property primarily liable to the payment of these legacies — and if they should fail in tracing it, it gave them the opportunity of making any case from which the personal liability of the executors might be shown to arise. The plaintiffs, the legatees, therefore raised no objection to this reference, but the executors did, and, by an appeal to me in the Court of Chancery, complained that no case had been * shown to found such an inquiry. I thought, however, * 766 the inquiry proper, saying — 'It may yet appear that the executors could not have realized the testator's property left to them invested in the brewery, but I think there is an ample case proved to justify the inquiry.'

"The plaintiffs, the legatees, well satisfied with the inquiry directed by the order of the 9th of May, 1839, and having succeeded in resisting the attempt of the executors to be relieved from it, prosecuted the inquiry in the Master's Office, so as to produce a report dated the 16th of December, 1843, favourable to their case, finding that the executors, but for their wilful default, might have possessed themselves of property of the testator sufficient to pay the legacies. But the Master of the Rolls, having upon exceptions to this report, thought that the circumstances did not justify this finding, the plaintiffs now, by the appeal to this House, complain of the reference directing the inquiry, and insist that instead of directing the inquiry, the Master of the Rolls ought, from the facts before him at the time, to have adjudicated and fixed the executors with a personal liability to the legatees for the amount of their legacies.

"If it were right at the present time to consider this question as the facts appeared before the Master of the Rolls in May, 1839, I should not hesitate to hold that the case was clearly one for further inquiry, but not for adjudication; but I am of opinion that we ought not to look at the case as it appeared in 1839. The

circumstances as they appeared to the Master of the Rolls at the time of his order in that year, did not appear to him to be such as would justify a decree against the executors. But he thought, and upon appeal I also thought, that they required further *767 investigation; and the *decree accordingly gave to the plaintiffs ample opportunity of establishing any case they might be able against the executors. To this the plaintiffs did not object, but brought before the Master, and ultimately before the Court, all the information that can now be obtained. But by this part of their appeal they say, 'Reject all this further information, and decide the case as it appeared in 1839, before that information was obtained.' If the decree directing the inquiries was to be reversed, the House could not judicially know what had been the result of such inquiries. It might therefore be adjudicating upon rights upon an apparent state of circumstances, when the real circumstances as disclosed might show that what appeared was directly contrary to the real facts. If inquiries are directed when there is sufficient before the Court to found a decree, the parties are no doubt prejudiced, and will have redress upon appeal. But they should be prompt in applying for it; the prejudice can only be expense and delay; and after those have been incurred, and further information obtained, a Court of Appeal will not readily listen to objections to the decree directing the inquiries. Such an appeal must add to the expense and delay; and if successful, would only lead to the rejection of the further information obtained — a result of no benefit, if the further information be immaterial, and unjust if it be important. I am therefore clearly of opinion that there is no ground for the appeal against the decree of the 9th of May, 1839, and the order affirming it.

"The more important question is whether, under all the circumstances of this case, the appellants, the legatees, are entitled to the payment of their legacies against the representatives *768 personally. The Master, * by his report of the 16th of December, 1843, finds that they are so entitled; but the Master of the Rolls, upon exceptions to that finding, has held that they are not; and that is the question upon the appeal of the legatees against the order of the Master of the Rolls of the 9th of May, 1845.

"The testator by his will gave all the surplus pecuniary capital,

which at his decease he should have in his business, over and above his rightful and stipulated proportion therein, with certain other property, to his wife and to Samuel Adams and Edward Marks, upon trust to invest such surplus capital, upon trust for his wife for her life, and after her decease to raise 12,000*l.* for the benefit of each of his two daughters and their children, and the residue for his sons George and William. And he gave all his share and interest in the brewhouse, plant, and all things used in carrying on the business, and in his stipulated capital for carrying on the same, but charged with such of his debts as his residuary estate should not extend to pay, to his legatees as to one half (that is, one fourth of the whole) for William Wyatt, and the remaining one half (or one fourth of the whole) for George and William equally. And he directed his executrix and executors to concur in carrying on and managing his said business, in conjunction with his sons of full age on behalf of William until he attained the age of twenty-one.

“The testator died in July, 1826, but, owing to a contest in the Ecclesiastical Court, probate was not obtained until December, 1827, and William Wyatt attained twenty-one in May, 1829. But at that time the business must be assumed to have been insolvent, it having been found by the valuation in the first cause of *Rowley v. Adams*, that on the 6th of November, *1829, the property, debts and effects were over 57,000*l.*, *769 and the debts and liabilities of the business over 64,000*l.*, leaving a deficit of 7000*l.* Now as, in order to charge the executors with these legacies of 12,000*l.* it would be necessary to prove that at the time of the testator's death there were funds of his in the business sufficient to pay the legacies, and that the executors had the means of realizing such funds, but from wilful neglect and default omitted to do so; the inquiry must be confined to the period from the testator's death in 1826, to November, 1829, during the whole of which time — or rather up to May, 1829, when William attained his age — the executors were by the will directed to carry on the business.

“The Master's report of April the 29th, 1835, finds that it was impossible to ascertain what was the amount of the testator's surplus capital; and the report of the 12th of June, 1837, finds that it was impossible to take any account of the partnership dealings and transactions, without which it is obvious that no possibility could

exist of ascertaining the surplus capital. Now, as the only fund applicable to the payment of these legacies would be the testator's capital, whether surplus or stipulated, in the brewery, these findings, confirmed and acted upon by the Court, go far to displace the first proposition of the plaintiffs, that at the testator's death, there were funds sufficient to pay those legacies.

"There have been several reports, attempting to trace the fund applicable to the payment of these legacies, and each report states results differing widely from the others, as the Master of the Rolls has very correctly observed,¹ showing how impossible it is, with the existing materials, to ascertain the facts. In attempting

* 770 to * ascertain what funds there were at the testator's death applicable to the payment of these legacies, too much reliance has been placed upon the recitals in the partnership deed of 1825, which states the plant, &c. as valued at 63,676*l.*, and the surplus capital of the testator at 48,915*l.* After the testator's death the plant was valued at 15,000*l.*, and the surplus capital, though it may have been correctly stated as between the parties to the deed of 1825, ought not to be considered in establishing a personal charge against the executors who were no parties to it. A statement by a testator, as to the value of his property, cannot form any ground for charging his executors with such value. But assuming the sums to be correct, the only meaning of which the term "surplus capital" is capable, is money, advanced for the purposes of the business beyond what the parties are bound to advance. But such surplus capital can only be realized out of the effects of the partnership, or by the other partners, if such effects are insufficient. It can only represent a debt, and that not payable, until all the partnership debts were paid, and then so much only as should be found due from the other partners upon taking the accounts between them, which it has been ascertained that there was no possibility of taking.

"It appears, therefore, that the recitals in the deed of 1825 cannot be relied upon for the purposes of the present inquiry. The evidence, indeed, shows that those sums were not made up exactly according to facts, and that the mode of making out the accounts could not lead to any safe conclusion as to the value of the property. When any new purchase was made for the purposes of the business, the money so laid out was added to the

¹ 7 Beavan, 395 : see pp. 418, 419.

amount of capital employed ; but the value of the property employed was not thereby increased, * the purchase being *771 only in substitution for what had been exhausted or worn out, of which no notice was taken. If profits were to be divided without reference to the ordinary expenditure, it is obvious that it would be a payment of profits out of the capital ; and the result would be that, in time, the apparent capital would greatly increase, whilst the real capital or property of the firm remained the same. This is the view I took of the case in my judgment at the Rolls, on the 11th of January, 1836, and, upon reconsideration, I think this view was correct.

“ Under the decree of the Master of the Rolls of the 9th of May, 1839, the Master has gone into an elaborate investigation of the necessary accounts to answer the inquiries thereby directed, so far as materials were found to exist for that purpose ; and partly from such accounts as have been procured, and partly from the evidence of witnesses, has come to the conclusion that there was, at the time of the testator’s death, property of his in the business sufficient to have paid the legacies. The Master of the Rolls has in his judgment of the 9th of May, 1845, investigated the grounds of this conclusion, and the evidence upon which the statement of figures rests, and has particularly observed upon the variances between this finding of the Master, and the findings in his former reports, and has come to the conclusion that in a question of charging the executors personally, there is not such proof of assets as the Court would require ; and in this opinion I fully concur. See 7 Beavan, pp. 419, 420.

“ That, however, is not the only or the most material point upon which the decree in this case must depend ; for assuming it to have been proved that at the time of the testator’s death he had the required amount of property coming to him from the business, and that there * were assets of his in the business *772 sufficient to have realized such amount, it is to be considered what was the duty of the executors under the directions of the testator’s will. If it was their duty to take immediate steps to realize and secure the testator’s property in the business, it could only be done by stopping the business and selling the property belonging to it ; but of what it would have realized under those circumstances no calculation can be made ; it is only certain that the produce would fall very short of any calculation made as to the value of the

property to parties, who were to use it in the business. This, however, would have been a direct breach of the duty imposed upon the executors by the will, for they were directed to concur with the testator's sons in carrying on the business until William should attain twenty-one, and he was under that age at the testator's death. The legacies were indeed primarily payable out of the surplus capital ; but if, as the fact is, such surplus capital was merged in the property employed in the business, and could only be realized by converting such property into money, it was obviously impossible for the executors to raise 12,000*l.* legacies, assuming that there were assets for that purpose, and to carry on the business.

"I cannot, therefore, for the purpose of charging the executors personally, assume that they were wrong in permitting the sons to continue the business, which the testator not only directed them to assist in carrying on, but made his share in it the subject of specific gift, in different proportions, to his sons. If it was not the duty of the executors to endeavour to realize the testator's interest

in the business at the time of his death, on account of the
 *773 directions to carry it on till William *attained twenty-one, such duty did not arise until the 21st of May, 1829, when he attained that age ; and of the value of the property at that time there is no evidence, except that in November following it was less by above 7000*l.* than the debts and liabilities to which it was subject, and that shortly afterwards the partners became bankrupts.

"But, assuming that it was not the duty of the executors to stop the business, for the purpose of realizing the legacies, till William attained twenty-one, and that there was not at that time property for that purpose, still the executors might have so conducted themselves in the management of the business in the interval, and have so been parties to the loss of the property as to have subjected themselves to personal liability to the legatees. But what is the history of that period ? Upon the testator's death, in July, 1826, Henry Earley Wyatt, the son, disputed his will, and the executors did not obtain probate until December, 1827 ; and it is found that the sons, the surviving partners, received what was recovered of the debts due to the business, and conducted and managed it themselves ; and of these transactions no evidence appears to exist. But the executors do not appear to have re-

ceived the share of the testator ; and the question is not now what they did receive, but as to charging them with the amount of what they might have received.

“ The strongest piece of evidence against the executors upon the subject of value is the deed of the 1st of January, 1828, by which Henry Earley Wyatt sold and assigned to George his one-fourth share of the business in consideration of 20,000*l*. To this deed the executors were parties, but the transaction was entirely between H. E. Wyatt and G. Wyatt. The *executors, indeed, by a deed of the same date, released *774 H. E. Wyatt from all responsibility to the testator’s estate, which was certainly a very unintelligible transaction, but no question arises upon it in this appeal. The case is not that H. E. Wyatt was responsible to the estate, and that such responsibility has been lost by this release. How G. Wyatt was induced to give, or agreed to give, 20,000*l*. for one fourth of a property and business, which in November, 1829, was upon the sale to Thomson of the testator’s half, at a valuation, found to be subject to liabilities beyond its value, cannot be explained. But it seems clear that whatever property the testator had in the business at the time of his death was lost in carrying it on, or by the misconduct of his sons, between that time and May, 1829, when William attained twenty-one, during which period the testator had directed his executors to carry on the business ; and there is no proof that such loss arose from any misconduct of the executors.

“ I am, therefore, of opinion that the charge against them cannot be supported upon that ground. The two propositions found by the Master, and combated by the first and second exceptions, are, I think, not capable of being supported ; and I therefore think that those exceptions were properly allowed by the Master of the Rolls.

“ If your Lordships shall concur with me in thinking the Master of the Rolls right in allowing the first and second exceptions, the question as to the personal liability of the executors will be disposed of in the negative ; and, in that case, the points raised upon the other exceptions become immaterial. But if it were material to enter into the details raised by those exceptions, I think, for the reasons stated by the Master of *the Rolls, that he *775 disposed of them in the proper manner. Having come to the conclusion that the legatees must seek their remedy against

the other property charged, and not against the executors personally, I think that the Master of the Rolls' decree contains all proper directions for that purpose. It properly leaves open all such remedies as any of the parties may be in a situation to enforce, and gives to the legatees the only relief which, under the unfortunate circumstances of this case, remains open for them.

"I greatly regret to add to the loss and expense these legatees have already sustained in this litigation, but being of opinion that the decree and order of the Master of the Rolls were altogether correct, I must advise your Lordships to affirm them, with costs, to be paid by the appellants; and I think a similar order should be made in the cross appeal."

LORD BROUGHAM. — Does your Lordship retain the same opinion as when you gave judgment below in this case?

LORD LANGDALE. — Yes, I am of the same opinion.

LORD BROUGHAM. — My Lords, my noble and learned friend from whose orders these appeals are brought, and who has just read the Lord Chancellor's opinion and judgment, has stated that he retains the same opinion which he held originally. In this case I did not attend so regularly as I generally do in the cases before your Lordships, but, from particular circumstances, I was requested to look into the case; indeed, my noble and learned friend, who is not now present, requested that I should look into it. I consider it to be a case by no means unencumbered with difficulty;

on the contrary, it is a case of very considerable complication,
*776 and has been so dealt with and so considered * throughout the whole of this long litigation. But, my Lords, upon the whole I see no reason to join in any proposition for reversing the judgment of the Court below and the orders of the Master of the Rolls, affirmed in some respects by the order upon the rehearing before the Lord Chancellor; and I have the less necessity to enter at any length into the case after the very elaborate statement of opinion, with reasons entering into every part of the case, both in point of fact and in point of law, which has been read by my noble and learned friend, from the Lord Chancellor. I had some doubts originally about the liability of the executors; but I have now come to the opinion that the Court below was right, and, therefore, I shall move your Lordships that the orders appealed from be affirmed with costs.

LORD CAMPBELL. — My Lords, the difficulty in this case is to get at the facts. When they are ascertained I think the case will be found to be without difficulty. The facts have been stated in the most luminous manner in the elaborate judgment of the Lord Chancellor, which my noble and learned friend has read, and after that there is not the smallest difficulty in concurring in the motion which has been made to affirm the decree and order.

Mr. Turner. — Will your Lordships pardon me for mentioning that there was a third appeal, which was considered as standing on the same footing as the appeal of the legatees. I understand the Lord Chancellor's judgment, which the noble and learned Lord has been kind enough to read, to dispose at the same time of that third appeal.

LORD BROUGHAM. — We understand so; Lord Cottenham certainly understood so, and it must be so considered.

* LORD LANGDALE. — There was no separate argument * 777 upon it: it was considered at the time to depend upon that which is now specifically disposed of.

LORD BROUGHAM. — There is no doubt about it; we will have that taken care of in the judgment.

The Orders complained of in the first appeal, of May, 1839, August, 1841, and April, 1845, were then affirmed, with costs.

The cross appeal of the executors against the order of 1845, and William Wyatt's appeal, were also dismissed, with costs.

1843. April 26.

The following is a note of the judgment in *Ward v. Ward* and *Ward v. Alsager*, referred to *ante*, pp. 760, 762. It is taken from a copy of a short-hand writer's notes, with which Mr. Gregson, solicitor in the causes, has favoured the reporters. The facts are fully stated in the judgment.

THE LORD CHANCELLOR (LORD LYNDHURST). — This is a distressing case; I have never adverted to it without feelings of pain and anxiety.

The outline of the case, so far as it is necessary for the purpose of raising and understanding the particular objections and questions that have been argued at the bar, may be stated in a few words: —

George Ward, a merchant in London, formed, in the year 1810, a partnership

with George Henry Ward and William Ward, his sons, and with a Mr. Thompson, who had been formerly his clerk. The partnership was formed for a period of seven years and a half, commencing in July, 1810: it was dissolved at the expiration of seven years, namely, in July, 1817; and in the month of November in that year, George Ward executed a deed, by which he conveyed his

* 778 share of the profits to * trustees, in trust, among other things, for the children of William Ward. The profits at that time were not ascertained; nor in fact until five years afterwards, — I think in the year 1823. The account was then made up by one of the partners, Mr. Thompson, who was an experienced accountant, and had been long engaged in business; and it stated the profits of the concern at about 90,000*l.*, exclusive of bad and doubtful debts, and exclusive also of a sum of about 10,900*l.* London Dock Stock. After this account was made up, it was submitted to the partners, it was acquiesced in, and the sum was divided into four parts, about 23,000*l.* to each. This was exclusive of the London Dock Stock, which amounted to between 2000*l.* and 3000*l.*, for each partner: it was carried to their separate accounts, and the money was paid over in shares to the different parties, with the exception, however, of the share of George Ward, — which, as I have already said, had been invested in trustees for the benefit, among other persons, of the children of William Ward. Mr. George Ward lived for several years afterwards: he died in 1829. During the whole of that interval his share of the profits remained in the hands of William Ward and Henry Baines Ward, and afterwards of William Ward, who succeeded to the business of the partnership. Nothing was done with respect to the trust funds, with an exception to which I shall hereafter advert. Upon George Ward's death the funds still continued in the partnership, and they remained there until 1836, with the exception of a sum of between 4000*l.* and 5000*l.*, which was drawn out and realized; and in that year William Ward became a bankrupt, and a very considerable loss ensued to the trust fund.

Two bills in Chancery were filed; the first, by George Henry Ward, for the purpose of being freed from the trust, and of obtaining a declaration that he was not liable for the deficiency created in the manner I have stated. A cross bill was filed on behalf of the children of William Ward, for whose benefit ultimately these profits had been conveyed, imputing neglect and misconduct to the trustee, calling on him to account and make up the deficiency. This is the outline

* 779 of the case, and what I have stated is sufficient for the purpose * of raising the particular questions to which I shall now in succession advert.

The first question regards the profits. I have stated that the profits of the partnership were ascertained in 1823, when the account was made up to the end of the partnership. Those profits were stated at the sum which I have mentioned. After they had been ascertained by Mr. Thompson, the scheme of the profits and the statement of the accounts were submitted to the consideration of all the partners. They acquiesced in the arrangement; the profits were divided according to that scheme; the fourth share was carried over in the partnership books to the account of each partner; and the account, as I have already stated, of George Ward's profits was carried to an account, entitled "the trust account of George Henry Ward and John Ayton." Some time afterwards some of the outstanding debts were collected, those which had been considered as doubtful

debts. They were divided among the several partners. Some liabilities were ascertained, and they were charged on the several partners in equal proportions. Every thing was considered as settled with respect to the partnership, and there can be no doubt that, as between the partners themselves, that settlement would be a binding and final settlement. But then a question of this kind has been agitated: It has been stated, and was argued that George Ward had employed the partnership funds for his own particular purposes; that he had laid out those partnership funds in government loans and contracts, and other speculations; and that very large profits had arisen from that employment of the partnership funds and assets; that that therefore was to be considered as a partnership concern, and that the partners were entitled to share in the profits.

First of all, I shall advert to the terms of the partnership deed. It was provided that none of the partners should engage in any business except that which was the subject of the partnership, with the single exception of George Ward; he was expressly excepted from that stipulation; he was allowed to do what he had been accustomed to do, namely, to engage in government loans and contracts, and any other speculation he might deem profitable. He had a separate account in * the partnership books, unconnected with the part- * 780 nership; that account was managed by Mr. Thompson, the partner who had been formerly his clerk. The profits of this concern were carried to that account, and were not mixed up with the partnership funds or the partnership transactions; it was kept entirely as a separate account. All this was known to all the partners; no complaint was made except in one particular instance. It was never supposed by the partners that this was a partnership account. So it continued during the whole duration of the partnership; five years afterwards elapsed before the account was settled. No claim was made, nor was it considered, during that period, that it formed a part of the partnership concern. It is true that, at one time, William Ward wrote a letter to George Ward, making some general complaints as to the application of the funds of the partnership. To that letter George Ward returned an answer, in which William acquiesced. No other complaint was ever made. On the settlement of the accounts, which took place in 1823, nothing of this private account of George Ward was introduced into that settlement. The scheme of settlement was submitted to the partners, was acquiesced in by them; no claim was made during the lifetime of George Ward, or any complaint made in respect of this account as between these parties; therefore this settlement must be considered as absolutely final.

But then it is said, and said justly, that, previously to this settlement of the profits, there had been an assignment of the profits to trustees for the benefit of those infants; that they were not parties to that settlement, and they cannot be considered as absolutely bound by it; they have a right (it is said) to an inquiry, and if I thought there was any doubt whatever with respect to this part of the case, I should say they were entitled; but I am satisfied that no doubt whatever exists with respect to it. The settlement was formed on a right principle; the infants were not directly represented in that settlement of the account, but parties who had precisely the same interest, namely, the other partners in the concern, were there. They knew the transaction; they were familiar with every part of it; it was their interest to increase their * share of the part- * 781

nership profits; they never insisted that they were entitled to share in this particular fund; and I am therefore perfectly satisfied that the settlement was made on a right basis, and that there is no ground whatever for opening that account; and therefore, though the infants were not represented at the time, I think there is not the slightest chance, if I was to direct any inquiry, that the account would be varied; and after a lapse of twenty years since the settlement of this account, I think I should not exercise a sound discretion if I were to direct the Master to make any inquiries with respect to it. And it is always to be recollected that George Ward had a control over this fund; he might at any moment have appropriated it in any way he thought proper. He considered the sum that was the subject of the trust was the ascertained amount of the funds of the partnership; he acted on that during his life, as will presently appear, when I come to advert to other parts of the case. Up to the period of his death, he considered this as the subject of the trust, and that would be an additional reason to induce me to say no account ought to be directed, because the person creating the trust, and having during the whole of his life an absolute control over it up to the period of his death, considered that was the subject of the trust. Under these circumstances, I think I should do extremely wrong if I were to direct an inquiry to be made with respect to what were the profits of that concern.

The next question is a question with respect to the interest. The settlement was of this nature: the profits were settled to the use, as far as relates to the interest, of George Ward for his life, after his death to the use of William Ward for his life; and afterwards for the benefit of the children. This fund remained in the hands of William Ward and Henry Baines Ward, and afterwards in the hands of William Ward alone; interest accrued on it, and the question is, to whom that interest belongs; whether it belongs to the personal representative of George Ward, or forms part of the trust fund. *Primâ facie*, it would belong to the personal representative of George Ward; but in this case we have to consider

* 782 what was done with this fund, and what were the proceedings with * regard to it. It was entered as a trust fund in the partnership books; every year the interest was added to the principal, and annual rests were made, and interest calculated on the aggregate amount. The interest therefore was entered in the books with the knowledge, and, as it appears, by the direction of George Ward, under the head of the trust fund, and made up in the way I have stated, forming a part of the trust fund. If I were to look at that account alone therefore, I should come to the conclusion that it was the intention of George Ward that the interest should be added to the principal, and that the whole should form a part of the trust fund. This was done during the life of George Ward for a period of twelve years without any exception, he himself giving directions as to the amount of the interest, which at first was 4 per cent. and afterwards was increased to 5 per cent. But the case does not rest here, because there is a distinct recognition on the part of George Ward that the aggregate fund was the trust fund. I allude to the letter of the 8th of March, 1828, written by George Ward to William Ward with reference to the complaints to which I have before adverted. He there states that the principal and interest amount to 29,000*l.*; and if you look at the accounts you will find they did amount to that sum at that time; but those 29,000*l.*, the principal and the interest by name, he says, form part of the trust fund, and are to go to his children. He says, "I have the power of revoca-

tion, but I never intend to exercise it." He therefore recognised this sum as a part of the trust fund. Taking the whole of this case therefore together, the manner in which the account was made up, the title of the account, the successive additions of interest to the principal, and going on for a period of twelve years during the lifetime of George Ward, and ultimately the aggregate sum being recognised as a part of the trust fund by the letter to which I have adverted, satisfy me that although, *primâ facie*, this interest would go to the personal representative of George Ward, he intended it to form a part of the trust fund, and that in fact it does form a part of that fund. I am of opinion therefore that this is to be considered the sum, — whatever it is, — is to be considered as the aggregate fund belonging to this trust.

* The next question relates to the London Dock Stock ; there was about *783 3200*l.*, which was the share of George Ward's profits of the London Dock Stock. Now, besides the trust deed of 1817, there was another trust deed, which was a continuation or substitution of former trust deeds, by which George Ward disposed of a very large property among his children. In the year 1828 the last of those deeds was executed, and then the fund was made up, and among the other items constituting it was a sum of 40,000*l.* London Dock Stock, and as a part of that 40,000*l.* the 2300*l.* London Dock Stock standing in the name of George Ward, and which formed a part of the partnership profits. The share of the partnership profits that had been allotted to George Ward, that 2300*l.* London Dock Stock, was transferred to the trustees under the deed of 1828. Now, it is certain, with respect to the identity of that sum, and that he intended to convey that London Dock Stock to the new trustees, for other uses and for other purposes. He having the power of revoking any part of the former trust, that would constitute, *pro tanto*, a revocation of the trust, and would transfer to the new trustees, for the benefit of these children, that stock, which formed originally a part of his share of the profits. It is said that this was a mistake ; that he was not aware that the London Dock Stock, which he so transferred, formed a part of the partnership profits, or that he had forgotten it : but there is no evidence whatever to show that it was a mistake ; there is nothing in any part of the proceedings to lead me to that conclusion. He was a man of business ; very well acquainted with his own concerns apparently ; very acute ; understanding all transactions of this kind ; and I cannot assume, therefore, that this was done under a mistake ; and in the letter to which I have before adverted, written in March in the same year, he seems to have contemplated the transfer of the London Dock Stock from the original trust to the new trust, because he states at that time what the trust fund consisted of, and he confines the trust fund merely to the principal and the interest of the money. It seems, therefore, that he contemplated at that time the transfer which took place a few months afterwards in the same year. I think, therefore, I *am bound to say that the London Dock *784 Stock, under these circumstances, was taken from the profits under the execution of the power of revocation, for it was done by a deed regularly executed, in execution of that power of revocation which he reserved to himself when he originally created that trust. There may be possibly some doubt as to the identity of that fund, whether it was really the same that was formerly assigned as George Ward's share of the profits. As far as I can collect from the proceedings, I am satisfied with respect to the identity ; but if the parties con

sider that it is doubtful, and that it ought to be made a matter of inquiry, so far the inquiry may extend.

I have disposed, therefore, of the question as to the profits, and of the question as to the interest, and of the question as to this appropriation of the London Dock Stock.

¹ The remaining question is the question of liability, which, after all, is the main and principal question in this cause. The question, as I apprehend, is this: Did George Henry Ward exercise a sound discretion in the management of this trust? Was he able reasonably to do more than he effected? If he was not, he is entitled to be indemnified.

The charges against him are, first, that this trust was created in the year 1817; that he did nothing in the trust during the lifetime of George Ward, a period of nearly twelve years, and that he did not commence acting in the trust for the purpose of endeavouring to get in the trust money and to realize it until after the death of George Ward, and that even then he neglected his duty in the manner in which he attempted to carry that into effect. Now, there is not any evidence, as it appears to me, leading to the conclusion that he knew any thing as to the particulars of this trust during the lifetime of George Ward. He swears positively, in his answer, that he did not know of it; he knew there was a trust of some kind, but what was the nature of it, — to what it extended, — when it was to commence, — when he was to act under that trust, — of all those particulars

he was entirely ignorant; and he says it was not until after the death of

* 785 George Ward, when he * found the trust deed tied up with the will, that he was aware of the nature of the trust, and that he had never accepted the trust, and there is no evidence to the contrary.

I am of opinion, therefore, that it is perfectly clear on the case as it stands before me on the evidence, and upon the papers in their present shape, that there is nothing whatever to charge George Henry Ward with any neglect of duty previously to the death of his father.

The question then is, what took place after the death of his father; and the first charge against him is of this nature, that he was very active in realizing that part of the property in which he himself was personally interested; he had a considerable interest in the residue, and was desirous therefore of getting in the assets. Now I think, when you look at the case, there is no just foundation for that charge. I think he did what every reasonable man would have done under such circumstances. There was a balance of about 19,000*l.* due on the cash account, or the account current of William Ward, or the firm of William Ward, to George Ward, at the time of his death. What was the nature of that account? It was an account that was kept by George Ward for the purpose of drawing for his immediate personal necessities; a species of ready money account. He kept no banker; the house of Ward and Company were his only bankers. It was the only available fund therefore for the purpose of supplying immediate wants; and what was done after the death of George Ward? That fund, which consisted of 19,000*l.* was reduced by 3500*l.* in payment of drafts, which had been drawn previously to his death, and which William

¹ The judgment, from this paragraph to the end, was read in the argument for the appellants in *Rowley v. Adams*.

paid without any consultation with the executors. The fund, therefore, was reduced at once to the sum of 15,500*l.*; the only sum that was drawn out at that time was a sum of between 2000*l.* and 3000*l.* It was the only fund that the executors could apply to, in the first instance, for the purpose of paying those charges which it was their duty immediately to defray. There were the funeral expenses, tradesmen's bills, and legacies to the daughters of 200*l.* each, which they were required to pay immediately, and he drew out for those purposes, and applied to those purposes, a sum of between 2000*l.* and 3000*l.* The fund was then reduced to 8000*l.*, and subsequently, by a * claim made * 786 against it, it was reduced to 3600*l.*, and ultimately these 3600*l.* were drawn out by instalments in two or three distinct payments. I think all this was the natural course of proceeding; the course that every man would pursue; the ordinary course of business. There was no particular impatience or particular anxiety to realize this fund or get possession of it. I think George Henry Ward, in this part of the transaction, acted with perfect accuracy and fairness.

Now, the next question is, was there improper neglect? Was there neglect in realizing the trust fund? It is to be remembered that George Ward, the creator of the fund, the creator of the trust, allowed it to remain in the hands of William Ward and Henry Baines Ward, forming a part of their capital for a period of twelve years, during the whole of his life. It was his intention at that time certainly that it should continue a part of the capital; he considered it necessary for the welfare of that concern, and that is shown by the letter I have before referred to—the letter of March, 1828, which he wrote to William Ward, in which he stated that he hoped that the trustees would be forbearing in the exercise of their duty; but at the same time reminded him that it would be a debt on his death, that it must be realized,—placed in a situation and state of security. Under these circumstances George Henry Ward acted. A correspondence began very soon (and a very painful correspondence it was) between him and his brother. I have read the evidence of Mr. Justice Patteson, the evidence of Mr. Burfoot, and the evidence of Mr. Saunders; and they all satisfy me of one thing, that it would have been impossible to have drawn out and realized the whole of this fund without creating the immediate bankruptcy of William Ward. It clearly, therefore, was not his duty to do that, because by doing that he would have ruined William Ward, who was one of the objects of the trust, and would have ruined and done great injury to William Ward's children, who were also objects of the trust. No man can say he did not exercise a sound discretion in not attempting to draw out the whole of the fund, when drawing it out, or attempting to draw it out, would have been attended with consequences such as I have stated.

* The question therefore resolves itself into this: Could more have been * 787 obtained than he did obtain? He persuaded William Ward to agree to pay the money by instalments of 3000*l.* every year. He tried to accomplish that; an agreement was entered into; William Ward could not make good the payment. In consequence of this, at the earnest instance, I think, of Mr. Justice Patteson, a new arrangement was come to, and he agreed to pay the interest of the fund, which was to accumulate for the purpose of realizing the whole amount for the benefit of the children. He made one or two payments; he could not continue those payments; it became necessary for George Henry

Ward to bring an action on the covenant. He obtained a verdict, and judgment, and shortly after that judgment was obtained, what was the result? Within a few months a fiat in bankruptcy was issued against him. I think, therefore, when I consider all these circumstances, and advert to the correspondence — the correspondence and to all the circumstances of the transaction — I think that George Henry Ward did all that he reasonably could do: that he could not have obtained more.

But still, this being a case in which infants are concerned, it is the duty of the Court to watch with special care over the interest of infants. A bill has been filed and a cross bill, and therefore the facilities of investigation in this Court by this double mode of proceeding have been greatly increased; but still I must say, after all the attention I have paid to this subject, the mode of investigation is imperfect, it is unsatisfactory; and I think I must, however reluctantly, direct an inquiry as to this part of the case; I think I should not do my duty to the infants, notwithstanding the feeling I have adverted to, if I did not direct an inquiry.

Therefore the substance of what I wish to state is this, that with respect to the London Dock Stock, if the identity of the fund is disputed, and nothing further, that may be made the subject of inquiry. I do not think there is any reasonable doubt about it myself, but I am not thoroughly convinced; and with respect to this last part of the case, there must be an inquiry whether the money has been lost from the wilful neglect and default of the trustee, or an inquiry to that effect; the precise terms at this moment I do not decide.

* 788 * It is considered that the question with respect to the interest is settled; that the question with respect to the amount of the profits is settled; and that the question with respect to the London Dock Stock is settled, with the simple exception which I have stated.

I do not direct the inquiry unless the parties wish it; it will be attended with great expense. It is for them to say whether they will take it. My impression is strong as to what will be the result of the inquiry, and I have stated it.

Mr. Bethell, of counsel for the infants, said he felt it to be his duty to them to take the inquiry. He had no discretion.

The Solicitor-General and *Mr. Turner* for defendants, said it was in the discretion of his Lordship whether he would direct further inquiry or not.

THE LORD CHANCELLOR. — I have looked at the different points, and have said that although my conclusions are so and so, more light may be thrown on the question in a variety of ways. It is almost universally the rule, especially where infants are concerned, to direct further inquiry.

Mr. Turner said, he believed that the assignees, for whom he appeared, ought still to be kept before the Court. The decree of his Lordship ought to contain distinct declarations of the three points which his Lordship had now decided, and the inquiry to be directed should be limited to the question of "wilful default" after the testator's death.

THE LORD CHANCELLOR. — Certainly.

* SMYTH v. DARLEY.

*789

1849. July 16, 17, 19, 27.

WILLIAM SMYTH, *Plaintiff in error.*HENRY FARRAN DARLEY, *Defendant in error.**Corporation "Magistrate." Election. Summons.*

Where certain acts of a corporation are to be performed at a special meeting of the members of that corporation, all the persons entitled to be present thereat must be summoned, if they are within a reasonable summoning distance.

The omission to summon any one so entitled renders the acts done at such meeting, in his absence, invalid.

A finding in a special verdict that a person entitled to be present at a special meeting of a corporate body was not summoned, and that he was at the time within summoning distance, throws on the party supporting the validity of the acts done at such meeting the *onus* of showing a sufficient cause for his not being summoned.

The election of treasurer for the county of the city of Dublin was vested by the 49 Geo. III. c. 20, in the "Board of Magistrates of the county of the said city," and was directed to take place at the Sessions Court of the city, by vote of the magistrates there present.

Held, that the Recorder of Dublin was a member of that board, and ought to have been summoned to a meeting of the magistrates summoned for that election, and that the omission to summon him rendered the election which took place in his absence invalid.

IN this case an action of assumpsit had been brought in the Court of Queen's Bench in Dublin, by Smyth against Darley, to recover the money received by the latter while he held the office of treasurer of the county of the city of Dublin. Smyth alleged that Darley never was lawfully elected to the office; but that he, Smyth, was on the 21st of February, 1839, thereunto lawfully elected under the 49 Geo. III. c. 20,¹ and that *Dar- *790

¹ By the third section of which it is enacted that "whenever the treasurership of the city of Dublin shall be vacant by the death, resignation, removal or dismissal of the present or any future treasurer, the Lord Mayor of the said city for the time being shall, within twenty-one days after such vacancy, convene the Board of Magistrates of the county of the said city of Dublin, to meet at the Sessions House in the said city, between the hours of twelve in the forenoon and two in the afternoon, and then and there, by the majority of votes of such magistrates as shall be present, shall proceed to elect a fit and sufficient person to be treasurer of the said city of Dublin; and at such meeting the said Lord Mayor, or in his

ley's possession of the office was a usurpation. Most of the facts out of which the contention between these parties arose were set forth in the report of the case of *Darley v. The Queen*.¹ For the purpose of the discussion on the present writ of error, it is not necessary to repeat them; but the following facts, found in the special verdict settled in this case, are material. On the 31st of January, 1831, Darley obtained a rule for a mandamus to the Lord Mayor to summon a meeting of the magistrates in order to declare him (Darley) to have been duly elected on a previous day to the office of treasurer. That rule was not made absolute till the 12th June, 1839. In the mean time, namely, on the 21st February, 1839, the Lord Mayor, acting, as it was said, on the advice of counsel, treated the previous election as altogether void, and convened a meeting of the city magistrates to proceed to an election of treasurer, under the provisions of the 49 Geo. III. c. 20, as if the office was actually vacant.

Before the year 1838, the Police Justices of the Dublin district had voted at the election of treasurer; but in that year a *791 statute had been passed (1 Vict. * c. 25) entitled, "An Act to make more efficient provisions relating to the Police in the district of Dublin metropolis," by which the jurisdiction of the Police Justices, known as Divisional or District Justices there, had been altered and limited, so that their jurisdiction no longer embraced the whole of the county of the city of Dublin, but was confined to a portion thereof. By this alteration it was deemed that their right to vote at the election of the treasurer was lost, and they were consequently not summoned to attend the meeting. No summons to attend the meeting of the 21st February, 1839, was issued to either of the sheriffs, or to the recorder of the Court, though all were within summoning distance. The sheriffs, however, attended, and tendered their votes, which were rejected. The recorder did not attend. Only fifteen aldermen out of the twenty-four were present. Darley caused a protest to be entered against this meeting for illegality in several respects, but took no further part in the proceedings. Smyth was consequently the only person who appeared as a candidate, and out of fifteen alder-

absence, the senior magistrate present, shall preside as chairman, and shall take the votes of the other magistrates, and shall not himself give his vote except in the case of equality of voices."

¹ 12 Clark & Finnelly, 520.

men who did attend, the other nine, though summoned, being absent, he received the votes of fourteen. The mayor thereupon declared Smyth duly elected, and he and his two sureties immediately afterwards entered into recognizances as directed by the Act, 49 Geo. III. c. 20, and he was at once admitted by the mayor to exercise the office.

On the 22d June, 1839, Darley, in obedience to the peremptory mandamus, issued in pursuance of the judgment delivered on the 12th of that month, was admitted to the possession of the office, Smyth being present, and formally protesting against his admission. On the 16th of November, 1839, one Robert Kinahan obtained leave to file a quo warranto against him, on * which judgment was given for the Crown.¹ Darley * 792 brought that judgment by writ of error to this House, on the question whether such an office was by law the subject of a quo warranto, and the judgment of the Court below on that question was affirmed ;² the result of which was that Darley was then completely ousted. As soon as that judgment of affirmance had been pronounced, this action was commenced to recover the amount of the fees and salary received by Darley between the 22d of June, 1839, and the ouster upon the judgment of this House in 1845. Smyth obtained a verdict ; the facts were turned, as before stated, into a special verdict, on which Smyth obtained judgment in the Court of Queen's Bench in Ireland. Darley brought a writ of error in the Court of Exchequer Chamber there, and, by a majority of seven to four Judges, a reversal of that judgment was pronounced.³ Smyth then brought the present writ of error.

There were several points raised for argument on the special verdict, but in the course of the discussion, the Lords intimated a wish that the arguments should be confined to the single point of the right of the recorder to be present at the election of treasurer.

Mr. Napier and *Mr. Fleming*, for the plaintiff in error : —

The question in this case chiefly depends on the construction to be put on the words to be found in the third section of the 49 Geo. III. c. 20, which, providing for an election upon a vacancy

¹ 3 Irish Law Rep. 334.

² 10 Irish Law Rep. 376.

³ 12 Clark & Finnelly, 520.

of the office of treasurer of the city, declares that the Lord Mayor shall, within twenty-one days of such vacancy, "convene * 793 the board of magistrates of the county of the said * city of Dublin"; and "by the majority of the votes of such magistrates shall proceed to elect." What is the meaning of "the Board of Magistrates of the city of Dublin"? Is the recorder of Dublin a member of that board? It has never before been deemed necessary to summon him. In practice, therefore, his right has not been admitted, nor even claimed. The first important Act to be referred to is that of the 13 & 14 Geo. III. c. 18 (Ir.), which, referring to, and repealing the 33 Geo. II. c. 13 (Ir.), provides for the regulation of the election of the treasurer of a county, by declaring that he is to be elected by "the Justices." The county of the city of Dublin is expressly included in this Act, and the form of the oath to be administered to a voter, at any such election, gives him the description, "a Justice." Now every magistrate is of necessity a Justice of the Peace, though every Justice is not necessarily a magistrate. Where the powers of a Justice are exercised as original and independent powers, the person so exercising them is a magistrate, and if he belonged to the corporation of Dublin, would be entitled to form one of its "Board of Magistrates." The aldermen of Dublin are in this situation. But where the powers of a Justice are not original, but are dependent on, or subordinate to, some other office, as in the case of the Recorder, he is not a magistrate within the meaning of the words of the Act. It is not the high rank of the officer that would give him the right to vote at the "Board of Magistrates" of the county of the city of Dublin; for there is no doubt that the Judges of the Court of Queen's Bench in Dublin are, in virtue of their high office, capable of acting as Justices in the city; but their authority in that respect being dependent on, or subordinate to, that of their office * 794 of Justice * of the Queen's Bench, they would have no right to sit at the "Board of Magistrates" of the city. Such a right must be inherent in the office itself, and not dependent on any thing else. *Bagg's Case*¹ shows the existence of this distinction; for there the writ was to restore to office James Bagg, who is described in the writ as "one of the twelve chief burgesses, or magistrates of the borough aforesaid"; that is, he was a magistrate of the borough, in virtue of being one of its twelve chief bur-

¹ 11 Rep. fol. 93 b (p. 174, ed. Thomas & Fraser); 1 Roll. Rep. 224, S. C.

gesses. The office itself was magisterial. The Act of Parliament here likewise affords its own interpretation ; for the second section recites that, persons elected aldermen may be persons in trade, and may not be qualified to act as Justices, but it authorises them so to act, and it expressly calls them "magistrates of the said city." The recorder is not mentioned as one of the number, and the constant intention to exclude all but aldermen is shown by the *non-intromittant* clause contained in the charter of the city, by which no Justices appointed by the Crown are allowed to interfere in its affairs. The 33 Geo. II. c. 16 (Ir.), known by the name of Lucas's Act, and entitled, "An Act to regulate the Corporation of the City of Dublin, and for extending the powers of the Magistrates thereof," was passed for the purpose of remodelling the corporation, and it divides the corporation into two classes of municipal officers, of which one consists of the Lord Mayor and the twenty-four aldermen, while the sheriffs, peers, and freemen form another class ; and it is remarkable that in no one of the Acts are the mayor, recorder and aldermen grouped into one class.¹

*The liberties of the city are more extensive than the *795 county of the city itself. The aldermen have by that Act jurisdiction over the whole ; the recorder is only a Justice within the city, and not for the liberties thereof ; for his name is omitted from the 18th section, which describes who shall be the Justices of the Peace for the city liberties. From the time of that Act to the present, the recorder has never in fact been summoned as a magistrate. The phrase "Board of Magistrates" must mean a known body of men, having equal and identical powers ; the recorder is the adviser of that body ; he is therefore not one of the board ; he is not in the extent of his jurisdiction their equal. If others besides the aldermen were admitted to vote, then the Judges, and not only the Judges, but the Queen's counsel (for they are, by virtue of their office, Justices in Dublin), and all the constabulary or divisional Justices would, on principle, have the same right.

[LORD BROUGHAM suggested that Queen's Counsel were not magistrates by virtue of being created Queen's Counsel, but that

¹ But see 1 Geo. III. c. 10 (Ir.), passed "to prevent the excessive price of coals in Dublin," the 6th section of which provides that "the Lord Mayor, recorder and board of aldermen of the said city, or the majority of them, shall make such rules," as to the usages and conduct of the measures of coals, "as the Lord Mayor, recorder and board of aldermen, or the majority of them, shall think proper."

they merely thereby acquired a title to act though they should possess no landed qualification.]

As to the constabulary, or divisional justices, their right has been expressly disaffirmed, and yet they are quite as much justices exercising authority within the city of Dublin as the recorder himself. The aldermen are justices for districts where the re-

* 796 corder cannot act. * It is inconsistent therefore to suppose

that he could sit as member of the same board, and as having equal rights with men who possessed jurisdiction where he had none. The statutes already quoted refer to counties, and include Dublin within their provisions; but the 1 Geo. III. c. 10, is an Act specifically relating to Dublin alone, and it speaks distinctly of the "Board of Aldermen," and does not include the recorder as a member of that board. The 33 Geo. II. c. 16, distinguishes the recorder from the mayor and aldermen, and for this reason it is expressly referred to by Baron Richards in his judgment. His Lordship says,¹ "The 19th section speaks of the recorder in his judicial capacity, which shows the way in which the legislature understood his functions; and we have also the 20th section, speaking of him as an officer of public trust. The Act appears to me to have manifestly constituted a board of magistrates, of which the recorder was not a member; nor am I aware of any Act which speaks of him in any other character than that of recorder, or which describes him as one of a class. Further, when we find the legislature saying that in the absence of the Lord Mayor (instead of the recorder, who is next superior officer, and who, if present, is entitled to take a part in the election, ought to have been nominated to take the chair) the senior magistrate present should take the chair, it is clear that it was not intended or contemplated that the recorder should be present." This statement puts the matter in a very clear point of view, and it is confidently submitted that the recorder is not entitled to be present, and to vote at

* 797 the election; and consequently that the election of * 21st February, 1839, though he was not summoned to attend it, is perfectly valid.

But even if the recorder had a right to be present, the special verdict does not show that he was in a condition to exercise that right; for it merely finds that he was "within summons" on the day of the election, but it does not find that he could have been sum-

¹ 10 Irish Law Rep. at p. 404.

moned, or that he was not, in fact, duly summoned. In this respect, therefore, the finding is defective.

Sir F. Kelly and Mr. Peacock, for the defendant in error : —

In order that Smyth may recover in this action, he must establish the proposition that he was duly elected in February, 1839. If the recorder was entitled to vote at that election, Smyth must show that the recorder, like the other persons entitled to vote, was duly summoned, or that some lawful and sufficient cause existed for not summoning him. Unless the election was in all respects a valid election, and unless Smyth was by that election completely clothed with the office of treasurer, he cannot be allowed to allege that the money received by Darley, while Darley held possession of the office, was money received to his use. He must show, not only that Darley had no colour of right, but that his own right was perfectly clear. Now, the special verdict, finding that no other persons but aldermen were summoned, excludes such an argument; for where a deliberative body in a corporation exists, all the members of it, having a right to be present, must be summoned; *The King v. The Mayor of Shrewsbury*.¹ And in *The King v. Hill*² the rule is thus laid down by *Mr. Justice Bayley: "Where the election of burgesses is fixed, either by charter or custom, to take place on a specific day, there it is the duty of every person entitled to vote to take notice that there is to be an election on that day. But when no specific day is fixed, and the election may take place at a meeting holden at any time, it is essential that notice of the meeting and of the business to be transacted there should be given to all persons resident within the limits of the borough, who are entitled to vote, and that that should be a reasonable notice, and at a reasonable time before the election actually takes place." It is not necessary here for Darley to show that the recorder might have been summoned; the duty to summon him lies on Smyth, and Smyth is bound to show the circumstances which excuse the performance of that duty.

LORD CAMPBELL. — Their Lordships are of opinion, that supposing the recorder to be entitled to vote as a magistrate, there is no doubt that he ought to have been summoned, if he was within

¹ Cas. Temp. Hardw. 147; S. C. nom. *Kynaston v. The Mayor of Shrewsbury*, Strange, 1051.

² 4 Barnewall & Cresswell, at p. 441.

a reasonable distance. Confine yourself therefore to the point of his right to vote.

Argument for the defendant in error resumed : —

Then comes the question — has the recorder a right to be present and vote at this election ? Is he a member of the “Board of Magistrates,” within the terms of the Act of Parliament, 49 Geo. III. c. 20 ? What was the state of the law before that Act ? It was, that in the county of the city of Dublin, as elsewhere, all the magistrates or justices of the peace had a clear right to vote at the election of treasurer. Mr. Shaw was recorder of Dublin at the time of this election. As such, he was a magistrate of the city. It would be strange to say that the 49 Geo. III. c. 20, must be so construed as to diminish the class of persons who
 *799 * were to be the electors ; for that Act itself adopts the provisions of the 13th and 14th Geo. III. c. 18, which says that it was passed to remedy the evil occasioned by the small number of magistrates entitled to vote. The construction contended for on the other side would perpetuate the evil instead of remedying it. The 33 Geo. II. c. 13, which was an Act for “regulating the elections of treasurers for counties,” gets rid of the supposed difficulty about the Lord Chancellor and the Judges, who are magistrates by virtue of their office, voting at these elections ; for it says that the Justices of the Peace, capable of holding the general sessions of the peace, shall be the persons to elect. And then the 32 Geo. II. c. 16, the Act passed to “regulate the corporation of Dublin,” says (§ 19) that the Lord Mayor and two justices of the peace, or the recorder and two justices of the peace, shall form a quorum, to hold the sessions of the peace for the city of Dublin. Now, as the city of Dublin is expressly included in the Acts relating to the election of treasurers for counties, which Acts give the right of election to the justices of counties, it is clear that the justices who are entitled to hold the sessions of the peace for Dublin are the persons entitled to vote for the treasurer there. The 13 & 14 Geo. III. c. 18, is the next Act which was passed to regulate the election of treasurers for counties ; and that Act says that the treasurer is to be elected by the justices of the county, and the county of Dublin is there expressly included within the Act. As, before shown, the recorder is one of the justices for the county of the city, and is one of the quorum, consequently he is one of the persons authorised by the Acts to elect.

This office is not a mere corporate office, and therefore * the reasons that might apply to restrict the election to * 800 the members of the corporation do not apply here. It is an office of a general kind, and was expressly declared so to be in the judgment of the Court below. It is the subject of Acts of Parliament which relate to county treasurers, and there is every reason to exclude it from the list of mere corporate offices. But then it is said that as the 49 Geo. III. c. 20, uses the phrase "Board of Magistrates of the said city of Dublin," it shows that this particular office is, unlike the rest, a mere corporate office; and that the election to it is therefore confined to aldermen. If such was the intention of the legislature, nothing was more easy than to have expressed it in plain, unambiguous language. That has not been done; but, on the contrary, the word "magistrate" must be taken to have been used as synonymous with "justices of the peace." But if this matter can be the subject of doubt on the previous statute, all doubt is removed by the 4 Geo. IV. c. 33, entitled "An Act for the more effectual regulation of the election of County Treasurers in Ireland," which thoroughly explains the meaning of the words "magistrate" and "alderman"; for there it is said that the election "shall be made at the meeting of the magistrates," and neither the word "aldermen" nor the word "justices" is employed in any part of the act, but in the third section, where justices of the peace for a county, or a county of a city and a county of a town, are described, they are called by the common appellation of "magistrates." In the same manner, in the 26 Geo. III. c. 24 (Ir.), passed "for the better Execution of the Laws within the City of Dublin," the words are used as synonymous. If such is the general purport of the statutes, what reason is * there for saying that there is any exception * 801 in this particular instance. The recorder may be a magistrate, although, on account of certain particular duties which he has to perform, he is distinguished from the other magistrates by the particular designation of Recorder. The election is to take place at "the Sessions Court," but that is precisely the Recorder's Court, and it cannot be assumed that for one particular occasion he is to be excluded from a Court which is especially his own. The construction sought to be put on these acts by the other side is forced and unnatural, and the judgment of the majority of the Judges of the Court below adopted the only construction which is

in accordance with the plain sense of the legislature : that judgment must be affirmed.

Mr. Fleming in reply : The statutes which apply generally to the election of treasurer for counties in Ireland do not apply to the particular mode of election of a treasurer for the city of Dublin, which is solely regulated by the local Acts passed with regard to that city alone. Counties are comparatively recent creations in Ireland. Henry VIII. made the first of them ; but cities date from the earliest times, and have preserved distinct and peculiar franchises. Every thing relating to Dublin has been treated of by the legislature as distinct from any other town, so that even the Act which was passed "for the more equal assessment and collection of public money in counties of cities and counties of towns," excluded Dublin from its operation. The duties of the recorder and of the justices of the peace appointed under the 26 Geo. III.

c. 24, are entirely different from each other, so that he * 802 cannot be assimilated to those justices, * and the Act cannot be treated as applying to him. The words "Board of Magistrates," in the 49 Geo. III. c. 20, must be taken to mean board of aldermen, and from that board the recorder is excluded. The 17 & 18 Geo. III. c. 43, is important, as explaining the word "board." That Act was passed for improving the police of Dublin, and it directs that the "Lord Mayor and board of aldermen" shall from time to time appoint men to be aldermen of wards and to be guardians of the peace of such wards, and every such alderman is to have power to appoint one of the common council his deputy, to act during pleasure ; but such deputy is not to act till approved of by the Lord Mayor and board of aldermen, and the 5th section calls these persons "aldermen and magistrates" ; and in the 26 Geo. III. the aldermen are called the magistrates of the city of Dublin. Taking the two Acts together, there can be no doubt as to the meaning of the phrase "Board of Magistrates." There are many important duties of city government, such as the licensing of hackney coaches, and the delivery of coals, in which the recorder can take no part, and wherever he is introduced he is so by name, — a fact which shows that in this particular instance he was not intended to be included among those who were invested with the power of election. Under the Act of Parliament called, The Act for the settlement of Ireland, the Lord Lieutenant is to

make rules relating to the government of the city of Dublin, which rules are to be deemed part of the statute, and to have authority as such. The first of these rules states that the Lord Lieutenant has made and established them for the better regulation and government of the city, and the election of the magistrates and officers thereof. Now, in all these rules the Lord Mayor and aldermen * are spoken of as constituting a board, but the recorder is * 803 never mentioned. Then comes Lucas's Act, which speaks of the "aldermen," and was passed to extend the jurisdiction of the aldermen, and does extend that of the aldermen, but does not affect that of the recorder.

July 27.

LORD CAMPBELL. — My Lords, this case having been so recently before your Lordships, and so fully argued, there is no necessity for my stating the nature of the action, or the facts found by the special verdict. The question which we have to consider, I think, is whether, as the law of Ireland stood in the year 1839, the recorder of Dublin was entitled to vote in the election of a treasurer for the county of the city of Dublin. The special verdict finds that he was not present at the election of the plaintiff, and "that he was not convened or summoned to attend at the said election." The election being by a definite body on a day of which, till summons, the electors had no notice, they were all entitled to be specially summoned, and, if there was any omission to summon any of them, unless they all happened to be present, or unless those not summoned were beyond summoning distance, — as, for instance, abroad, — there could not be a good electoral assembly; and even a unanimous election by those who did attend would be void.

Objection is made here that the special verdict is defective, in merely finding that "the recorder was within summons on the day of the election." But if he was entitled to vote, I am of opinion that the *onus* was cast upon the plaintiff of showing that he could not * be summoned. The special verdict contains * 804 no negative statement upon that subject, and we are bound to suppose that no evidence was given to prove his absence to have been occasioned by any thing else except the want of a summons.

The question whether the recorder was entitled to vote in the election of treasurer for the county of the city must be attended

with great difficulty, as the very learned Judges were divided upon it. They have treated it with the care and ability which eminently distinguish all their deliberations. But, my Lords, after several times perusing all their opinions, as well as attentively listening to the arguments at our bar, I feel no hesitation in agreeing with the majority, that the recorder was entitled to vote.

Every thing turns on the construction to be put upon the expression found in the 3d section of 49 Geo. III. c. 20, "the board of magistrates of the county of the city of Dublin." Is the recorder therein included or excluded? *Primâ facie* he is included; for he is undoubtedly a magistrate of the county of the city of Dublin. "Magistrate" here certainly means *justice*, and by the charter of Charles II. he is expressly constituted a justice. I do not think there is the slightest weight in the arguments adduced to prove that under subsequent statutes he has, in some respects, ceased to be a justice of the city. Lucas's Act, 33 Geo. II. chapter 16, is chiefly relied upon. But this only adds to the number of the justices, and in enacting that the lord mayor, aldermen and sheriffs shall be justices, it by no means disfranchises the recorder.

A doubt seems to have arisen whether the Statute 13 & 14 Geo. III. c. 18, applied to the election of a treasurer for * 805 the county of the city of Dublin. Several * of its enactments do apply exclusively to the election of a treasurer for a county. But after the 49 Geo. III. c. 20, I think we are bound to understand that the 13 & 14 Geo. III. c. 18, extended to the election of a treasurer for the county of a city; and, therefore, that the recorder of Dublin, as a justice for the county of the city, prior to the 49 Geo. III. c. 20, was entitled to vote. No importance can be attached to one of the findings of the jury, that at one particular election, which is mentioned, aldermen only were convened.

The 49 Geo. III. c. 20, instead of disfranchising the recorder, uses, I think, language well calculated to preserve his rights; it gives the power of election to the magistrates of the county of the city, and he is one of them. The word *board* is used; but this seems to me to be here synonymous with bench; and the lord mayor, on a vacancy of the office of treasurer, may therefore be said to be required "to convene a bench of magistrates," to meet at the Sessions Court in the said city. The same magistrates are to be convened who would meet if sessions for the county of the

city were to be held. It has been gratuitously asserted, that when the aldermen of Dublin meet as magistrates, the recorder attends only as their assessor. On the contrary, it is quite clear that he is present with co-ordinate authority, as a member of the Court, board, or bench. He is a dignified officer; but there can be nothing derogatory to his dignity in voting for so important an officer as treasurer for the county of a city.

Several statutes have been cited to us, where the expression occurs "board of aldermen," and it is said that at such a board the recorder would have no right to be present, *because, although he is a justice, he is not an alderman. *806 But the very existence of this designation of "board of aldermen," strengthens the claim of the recorder to vote for treasurer; for, if the right of voting was to be confined to aldermen, why was not the well-known designation of "board of aldermen" adhered to. But the designation used is the "board of magistrates of the county of the city of Dublin," and of this board the recorder, being a magistrate, is a constituent member.

If this should be your Lordships' opinion, it entirely disposes of the case, and there is no occasion for considering the other objections taken to the plaintiff's right to recover.

Were the election of treasurer for the county of the city of Dublin still to take place under the same statute, for the sake of avoiding future disputes and future litigation, your Lordships might be desirous of determining the right of the other claimants to join in the election; but as the election now takes place under a totally different law (which I hope may be more free from doubt), no good could arise from doing more than what is necessary to dispose of this writ of error.

I therefore move, my Lords, that there should be judgment for the defendant in error.

LORD BROUGHAM. — My Lords, I entirely agree with my noble and learned friend, and for the reasons which he has given. The point which he made towards the latter part of his observations is one which occurred to me during the argument at the bar, and which appeared to me to decide the question, without any thing further. I shall therefore say no more than that I entirely concur in his proposition.

Judgment for the defendant in error, with costs.

1849. July 13, 31.

ALEXANDER SMITH,	<i>Appellant.</i>
The EARL OF STAIR and others, Officers of State	} <i>Respondents.</i>
in Scotland,	

Costs. Officers of the Crown.

The officers of state in Scotland obtained a judgment on interdict against an individual who had, by erecting a wall, encroached on the sea-shore, the suit being instituted by them solely to protect the public right. The judgment of the Court below was appealed against, and affirmed, but was affirmed without costs.¹

LORD ABERCORN had a grant from the Crown of certain lands adjoining the sea-shore, in the Barony of Duddingston, with limitations as to the right of granting them out. In the year 1805, he granted to a person, named Stewart, a charter or lease of a certain part of this land, amounting to an eighth of an acre, for the purpose of building a house thereon. In this instrument, one of the limits of this piece of land (the only one material to be considered), was thus described: "bounded by the sea-shore to the north." The sea-shore was described in the allegations of fact as consisting of an extensive stretch of open sands, which the sea covered at spring tides. That part which was covered by the ordinary tides was firm and solid, that which was only covered when there were spring tides consisted of a deep loose sand. All these sands the inhabitants of the neighbouring town of Portobello, and of the surrounding country, had been accustomed to use for all purposes of pleasure and recreation, and the

* 808 * troops had frequently been publicly reviewed there. The lease came into the hands of Smith, who, in the year 1842, built a wall, which, it was alleged, was placed for some distance across the loose sand, and reached down to that which was covered at every ordinary tide. The respondents having had complaints made to them on this subject, applied to the Court of Session for an interdict against the appellant, for the purpose of prohibiting

¹ The case is reported, on other points, in 6 Bell's Appeal Cases (Scotch), p. 487.

him from going on with the erection of his wall. On this proceeding in the Court of Session, the question raised was, as to Smith's right to maintain the wall beyond the high-water mark of ordinary spring tides, either with reference to the terms of his lease, or to the rights of the Crown to grant away the sea-shore to a private individual. The judgment of the Court below was given in favour of sustaining the interdict. The appellant appealed against that decision, and the judgment of the Court below was then affirmed, and in moving the affirmative, it was moved that it should be affirmed, with costs.

Sir F. Kelly and *Mr. Anderson*, for the appellant, requested to be heard on the question of costs. This was a case in which the Crown was a party, and for that reason no costs were given in the Court below. In a case of *The Commissioners of Woods and Forests v. Lord Bute* the Court of Session had acted on the same principle.

Mr. Bethell and *Mr. Elliott* for the respondents: The rule is not so in the Court of Chancery in this country. There the principle acted on has been this, that where the Crown is suing for a public object, it is allowed to receive costs. This is so in the cases of *public charities, though the Crown *809 sues on the information of a relator. [LORD BROUGHAM.

— Yes ; that is the benefit of having a relator.] The same rule applies where the Attorney-General appears as defendant in such a case. [LORD BROUGHAM. — The Crown would not have to pay costs here ; if so, then it cannot get them ; the right to costs must be mutual.] That is not necessarily so. Suppose a suit by the Crown against a subject, in the matter of a public right, and a judgment in the Vice-Chancellor's Court, and then in the Lord Chancellor's Court for the Crown, and yet an appeal brought in this House ; are the public to pay for all this vexatious litigation ? It cannot be said that they are. The recent case of *The Attorney-General v. The Corporation of London*¹ at the Rolls is in point. In that case there was no relator. The Master of the Rolls there said, that the Corporation would be liable to costs, but it is doubtful whether it will, should it be successful, get them from the Crown. That shows that the two things are not identical. The

¹ Since reported 12 Beavan, 171.

right of the Crown to receive costs, and its liability to pay them, are not correlative terms. [LORD CAMPBELL. — Suppose the Attorney-General files an information in respect of a public way, and asks for an injunction, how can he get costs there?] The Crown would have a right to costs there. Such a case is like that of *The Attorney-General v. The Corporation of London*, which was entirely a proceeding by the Crown in respect of a public right.

The Attorney-General (amicus Curie) said, that in the case referred to, the Master of the Rolls had intimated an opinion that the Crown was entitled to costs, but no costs had been formally awarded.

* 810 * *Sir F. Kelly* referred to *The Lord Advocate and the Officers of State in Scotland v. Lord Dunglas*,¹ to show that in a case like the present, the Crown would not be liable to pay costs. He insisted that the liability to pay, and the right to receive costs were mutual, and as the House had there decided that an appeal would lie, should costs be improperly awarded against the Crown, that case must be taken as in principle deciding the present. But the case of *The Corporation of London v. The Attorney-General*, decided in this House,² is an authority against ordering the present appellant to pay costs; for there the Lord Chancellor said, "I do not mean to say that a case may not occur in which the Attorney-General would be liable to pay costs, but then, where private parties have no chance of getting costs, and they have none here, the Court is cautious how it makes them pay costs," and the judgment of the Court below, in favour of the Crown, was affirmed, without costs.

LORD BROUGHAM. — The cases of charities would not apply to the present. The case of *The Mayor and Commonalty of London v. The Attorney-General*, as now referred to, seems in point. But before giving our decision, we will speak to the Master of the Rolls on the subject.

July 31.

LORD BROUGHAM said, that the Lords had considered this case, and no costs would be given.

¹ 9 Clark & Finnelly, 173.

² 1 House of Lords Cases, 440, see p. 471.

* DANIEL v. WOODROFFE.

* 811

1848. July 4, 5, 6, 7, 10. 1849. July 27, 30.

JOHN DOE, on the several demises of JAMES } *Plaintiff in error.*
 F. N. DANIEL and others, }
 GEORGE WOODROFFE, *Defendant in error.*
Et è Contra.

Deed-Poll. Base Fee. Merger. Estoppel. Entry. Remitter.

An estate being limited to the use of A. and his wife, and the heirs of their bodies, with remainder to A. in fee, and A. having died, leaving his widow, and G., an only son, and L. and H., only daughters, the widow, in 1735, by deed-poll, in consideration of an annuity granted to her by G., and of natural affection, granted, surrendered, and yielded up the estate to him in fee; and he afterwards, during her life, suffered a recovery. She died in 1767. G. died, without issue, in 1779, having devised the estate to trustees, to secure an annuity to B., only son of his sister L. (then dead), and subject thereto, to W., eldest son of B., for his life, with remainder to B.'s second son. In 1790, W., on his father's death, entered into possession of the whole estate, claiming under the will of G., and subsequently did various acts in the character of devisee for life. In 1814 he suffered a recovery of one moiety of the estate, and in 1816 conveyed the entirety to mortgagees in fee. In 1818, M., the descendant of H., the other coparcener, suffered a recovery of the other moiety, which, it was declared, should enure (subject to the trusts of a term) to the use of W.'s mortgagees:—

Held, by the Lords, — affirming a judgment of the Court of Exchequer Chamber, — 1st, That the deed-poll of 1735 operated as a covenant to stand seised, and created a base fee, determinable by the entry of the issue in tail: 2d, That this base fee did not, on the widow's death, become merged in the reversion in fee in G., as the estate tail subsisted as an intermediate estate: 3d, That, although G., being estopped by the recovery suffered by him, was not remitted to the estate tail, no right of entry accrued to any one until his death, and therefore the period of twenty years, for the operation of the Statute of Limitations against the issue in tail, was to be calculated from his death, and not from the death of his mother, and consequently W.'s entry (in 1790) was not barred by lapse of time: 4th, That although W. entered under the will, and manifested an intention to take the estate under it for his life only, that was immaterial, and he was remitted as to his moiety to the original estate tail, which was barred by the recovery in 1814; and 5th, That the entry and remitter of W. did not operate to remit his coparcener M., to the other moiety of the estate.

THESE writs of error arose out of an action of ejectment, brought in the Court of Exchequer, upon eight several demises by the sev-

eral lessors of the plaintiff, against the defendant, George Woodroffe, to recover possession of certain lands and tenements in the county of Surrey. The cause was tried at the Summer

*812 * Assizes for that county, in 1839, and a verdict was found, for the defendant as to part of the premises, and for the plaintiff as to the residue. A rule for a new trial having been obtained, the parties, at the suggestion of the Court, agreed that the facts should be stated in the form of a special case, with leave to turn the case into a special verdict, which was accordingly done.

The special verdict set forth all the facts and documents relied on by both parties; but the following are sufficient to raise the questions for the decision of this House:¹—

By indentures of lease and release, dated January, 1710,—recited to be made in pursuance of marriage articles,—George Woodroffe, being seised in fee of the lands in question, conveyed them to the use of himself for life, remainder to his first and other sons in tail male, remainder to the use of his brother Robert Woodroffe and Hester his wife, and the heirs of their bodies, with remainder to the use of the said Robert in fee. Robert died intestate in February, 1710, leaving the said Hester, his widow, and three children by her, namely, George, his only son, and Lettice and Hester, his only daughters. George Woodroffe, the settlor, died in 1713, without having had any issue, whereupon Hester, widow of Robert, entered into possession of the said lands.

By a deed poll, executed by Hester Woodroffe in 1735,—after reciting the indentures of settlement of 1710, and the death of the settlor without issue, and the death of the said Robert, leaving issue by Hester as aforesaid, and that by means thereof, and by virtue of the said settlement, the lands in question were well vested in her for her life, with the immediate remainder

*813 * thereof to her son George,—she, in consideration of an annuity granted by him to her, and of natural love and affection, granted, surrendered, and yielded up the premises to him, his heirs and assigns for ever. Upon the execution of this deed, George, the son, entered into possession of the lands, and afterwards, in the same year, by deed of bargain and sale enrolled, conveyed them to a tenant to the *precipe* in a common recovery to be suffered by him to the use of himself in fee, which recovery was

¹ For a fuller statement, see 10 Meeson & Welsby, 608.

accordingly suffered in the same year, and therein he was vouched, but Hester, his mother, was not vouched.

This George Woodroffe was twice married, first, in 1735, shortly after the said recovery, and again in 1765, and on both occasions he made settlements of the lands in question by deeds of lease and release, but both his wives having died, and there being no issue of either marriage, the estates created by those settlements terminated in his lifetime.

Hester Woodroffe died in 1767, without having done any act — except executing the deed poll — to alter or affect the title of the said lands, leaving her son George in possession of them, who thereupon became the heir in tail under the settlement of 1710. His elder sister, Lettice, wife of William Billinghamurst, had previously died, leaving the Rev. Wm. Billinghamurst her only son and heir. He had issue two sons, William and George, each of whom afterwards took the name of Woodroffe, and the latter is the defendant in the first writ of error. Hester, the other sister of George Woodroffe, was twice married, first to Thomas Caverley, and, surviving him, she married a second husband, and died in 1784, leaving Ann, then wife of Thomas Walker, her only child and heiress at law. Mrs. Walker died in 1797, leaving a daughter Jane, her only child and heiress at law, who, having *survived D. * 814 Watherstone, her first husband, married, for her second husband, William Mordaunt Maitland, who is one of the lessors of the plaintiff.

George Woodroffe (son of Robert and Hester Woodroffe) died in 1779, having by his will declared that he devised considerable estates, including the lands now in question, to two trustees, in trust to pay an annuity of 200*l.* to his nephew, the said Rev. W. Billinghamurst, for his life, and, so charged, he devised the estates to the use of William Billinghamurst, eldest son of his said nephew, for his life, with remainder to his first and other sons in tail male, with remainder to George, his said nephew's second son, for his life, with remainder to his first and other sons in tail male, with divers remainders over. The will contained a direction that all persons taking the devised estates should take the name and arms of Woodroffe.

On the testator's death the trustees named in his will entered upon the devised estates. The Rev. Wm. Billinghamurst and Hester Caverley were, at the testator's death, co-heirs of the bodies of

Robert Woodroffe and Hester his wife. On the Rev. W. Billinghurst's death in 1790, his elder son William, having then attained his age of twenty-one, took the name and arms of Woodroffe, and entered into possession of the lands in question. Between that time and the year 1814, he executed various deeds, in which he was stated to be tenant for life under the said will; but in 1814 he suffered a recovery of one moiety of the lands comprised in the settlement of 1710, declaring the use to himself in fee; and by indentures of lease and release, dated February, 1816, he conveyed the entirety of the said lands to Robert Stuart and Mark Drury in fee, by way of mortgage, to secure a sum of 10,000*l.*, with the usual proviso for redemption reserved to him and his heirs.

* 815 * In Easter Term, 1818, the said W. M. Maitland and Jane his wife (granddaughter and heiress of Hester Caverley) suffered a recovery of her moiety of the lands in question, which was, by other deeds executed in the same year, declared to enure to the use of the said W. M. Maitland for five hundred years, to secure to him 4500*l.*, and, subject to that term and the trusts thereof, to the use of the said R. Stuart and M. Drury in fee, subject, however, to the same proviso of redemption in favour of William Woodroffe and his heirs as was contained in the mortgage deed of 1816.

Pedigree.

George Woodroffe (the settlor of 1710): Robert Woodroffe — Hester.

George Woodroffe
(the Testator),
died *s. p.* 1779.

Lettice Woodroffe,
married W. Bil-
linghurst.

Hester Woodroffe,
married J. Y. Ca-
verley, and after
him a second hus-
band, and died a
widow in 1784,
leaving issue.

The Reverend
W. Billinghurst,
who died in 1790.

Ann,
who died in 1797,
leaving issue.

W. Billinghurst,
took the name of
Woodroffe in 1790,
and executed a
mortgage to Stuart
and Drury, lessors
of the PLAINTIFF,
and died without
issue in 1824.

Geo. Billinghurst,
also took the
name of Woodroffe,
and in 1824, on
his brother's death,
entered on the
lands in question
(DEFENDANT).

Jane,
who married D.
Watherstone, and
after him W. M.
Mordaunt, one of
the lessors of the
PLAINTIFF.

William Woodroffe, or the parties claiming under him, continued in possession of the lands in question until his death, without issue, in August, 1824, when his brother George, having taken the name and arms of Woodroffe, entered into possession of them, claiming title as tenant for life under the will of his grand-uncle George Woodroffe.

* The ejectment was brought on demises from persons * 816 deriving title under Stuart and Drury, the mortgagees, and W. M. Maitland. The Court of Exchequer, after argument on the special case, gave judgment in 1842 as to the entirety of the lands in favour of the plaintiff, and the case having been turned into a special verdict, final judgment was entered for him thereon in 1844.¹

From that judgment George Woodroffe brought a writ of error to the Court of Exchequer Chamber, which, in 1846, affirmed the judgment of the Court of Exchequer of Pleas as to one moiety of the lands, — being the moiety derived from W. Woodroffe, — and reversed it as to the other moiety, being that to which Ann Walker, mother of Mrs. Mordaunt, was formerly entitled.²

Against the latter part of that judgment the plaintiff in the action brought his writ of error in this House; and against the first part of it the defendant in the action brought the second writ of error.

The questions in both cases were argued for several days, in July, 1848, in the presence of the Judges of the Courts of Law,³ Lord Brougham presiding.

Mr. Turner and *Mr. Bethell* (*Mr. Peacock* and *Mr. W. Hayes* were with them) for the plaintiff in the first writ of error and defendant in the second: —

It is found by the special verdict, in substance and effect, that Hester Woodroffe was, in 1735, seised of the property, the moiety of which is now in question, * for an estate tail in * 817 possession, and by the deed poll of that date she conveyed the whole to George (her only son and heir) and his heirs; that he thereupon entered into possession, and in November, the same year, conveyed the same property by deed of bargain and sale en-

¹ 10 Meeson & Welsby, 608.

² 15 Meeson & Welsby, 769.

³ They were Baron Alderson, and Justices Patteson, Coleridge, Coltman, Maule, Cresswell, Erle, and Williams.

rolled, to a tenant to the *precipe* in a common recovery to be suffered by him, — and which was accordingly suffered, — to his own use in fee ; that Hester died in 1757, leaving George her heir in tail, who died in 1779, without having done any other act to affect the estate tail. He had made two several settlements on his marriages, the first in 1735, the second in 1765, but there having been no issue of either marriage, the nature of his estate, under the ultimate limitations in those settlements, remained the same as it was in 1735. The necessary construction of law upon these facts is, that George Woodroffe was seised of the property for an estate tail in possession, and consequently had not, at the time of making his will or of his death, any devisable estate or interest in the property, except the reversion expectant on an estate tail, which was afterwards barred.

The estate tail not having been barred or discontinued by any act of Hester, or of her son George, the only ground upon which it could be contended that any estate or interest in the property in question passed by his will is, that his entry under the deed poll of 1735 was the acceptance of a base or determinable fee, which estopped him from asserting, either before or after the death of Hester, any other title ; or that if his entry under the deed poll did not produce that effect, yet the recovery suffered by him in 1735, though ineffectual to bar the estate tail (he not being then tenant in tail), was an estoppel by matter of record, where-
 *818 by he was *precluded from setting up any claim to the estate tail, and that, according to either view, the base fee continued after his death. Each of these propositions, if examined, will be found to have insuperable difficulties to contend with.

First, as to the deed poll, — supposing, without however admitting, that such a deed, followed by entry under it, was capable of working an estoppel, — it discloses upon the face of it the actual state of the title by reciting the deeds creating the entail, and the death of Robert, leaving George his only son by Hester, and then it states, erroneously, that “ by means thereof, and by virtue of the settlement, the tenements became and then were well vested in Hester for her life, and that the immediate remainder thereof belonged to George, son of Robert and Hester ” ; so that the estoppel and conclusion (if any) would go to exclude any averment contrary to the allegation of the plaintiff in error, — viz. that on

and by the death of Hester, without more, the base fee absolutely determined. The deed poll shows, upon the face of it, that Hester was seised of an estate tail in possession, and consequently capable of passing, by way of ordinary conveyance, an estate founded upon ownership, and the argument of the defendant in error admits that it did actually pass a base fee. But it is clear law, that where the instrument itself shows an interest in the conveying party, so as to render it sufficiently operative by way of conveyance, the doctrine of estoppel is excluded.

Secondly, as to the recovery suffered by George in the lifetime of Hester, his ancestor, the recovery deed and recovery must be taken together and construed as a common assurance, operating simply as a conveyance by George to his own use of the estate vested in him *under the deed poll; for, unques- * 819 tionably, a tenant in fee, whether absolute or base, was competent to convey by recovery, and it was never apprehended that by adopting that mode of conveyance, he was estopped from alleging at any time afterwards, that he had, subsequently to the recovery, become tenant of an estate in the land, other than the estate which he had at the time of the recovery. The doctrine which attributes so conclusive an effect to the recovery would go even to deny the capacity of George, after the death of Hester, when he became heir in tail in possession, to create a discontinuance by feoffment, or to acquire the absolute fee by suffering another recovery, or by any means whatever to determine the base fee. The principle that, where an assurance is operative by passing an interest it has no operation as an estoppel, applies also to the recovery.

As respects both assurances, the deed poll and recovery, admitting that there might be an estoppel, yet estoppels operate only as between parties and privies, and there must be a person to be estopped as against another person entitled to the benefit of the estoppel; but, on the death of Hester, there ceased to be any person in whose favour the supposed estoppel could possibly operate. Also, the plaintiff in error derives title under the issue in tail, who cannot be bound by estoppel; but to affirm that the plaintiff in error is precluded from alleging that George, on the death of Hester, became seised of an estate tail in possession, is in effect to bind the issue in tail by estoppel. When the defendant in error admits (as he is obliged to do) that the recovery was void as against the

issue in tail, but at the same time insists, that by reason of such recovery the base fee must, in a contest between a claimant under that fee and a claimant under the estate tail, be

* 820 * deemed to have continued after the death of George, so as to prevent the claimant under the estate tail from recovering, that argument involves a manifest contradiction.

Nothing therefore having been done to discontinue the estate tail, or take away the right of entry in respect of it, that right devolved, on the death of Hester, upon George, who, being then in the actual possession, was, by a necessary consequence of law, in of the estate tail, independently of the learning of remitter, properly such, which was applicable only where the estate tail had been divested and turned to a right to be asserted by a real action.

If George Woodroffe, the testator, had not in his lifetime any devisable estate, no act done or statement made, subsequently to his death, could, at law, have the effect of bringing the property in question under the operation of his will. Even assuming that the base fee continued after the death of Hester, and passed by the will of George, still, as the right of entry in respect of the estate tail was not taken away, that fee was determined by the entry of William Woodroffe in 1790, such entry being, by construction of law, an entry on behalf of himself and Ann Walker, as co-heirs in tail. The 12th section of the Act 3 & 4 Wm. IV. c. 27, on which alone the defendant in error can found any answer to this argument, did not make any alteration, either prospective or retrospective, in the law, with respect to the effect of entry of a co-tenant for any purpose not within the purview of the Act, but left the general doctrine as to its constructive operation wholly undisturbed; and if the entry of William admits of no other construction than that for which the plaintiff in error contends, then the estate tail in

* 821 the entirety was * to all intents restored, and the defendant in error is reduced to confine his argument to the character and effect of the subsequent enjoyment. Although it is true that, with respect to exclusive enjoyment by a co-tenant, the enactment in the 12th section negatived, both prospectively and retrospectively, the presumption of the former law, yet it must be understood to have so done for the purpose only of limiting, as between co-tenants or those claiming under them, actions or suits concerning matters which, down to the period when the statute came into operation, continued to be litigable. But, in the present case, the

contest is between a person claiming through both the co-heirs in tail, and a person claiming adversely to their common title, and moreover every possible question as to the state of the title, from the period of the entry by William, in 1790, down to the arrangement in 1818, under which the then co-heiress in tail suffered a recovery of the moiety in question, was finally disposed of by that arrangement; or if, notwithstanding the relative position of the present litigant parties, and notwithstanding the transaction of 1818, the actual title in regard to that moiety can be considered as depending upon the nature of the enjoyment, as being adverse or non-adverse during the above interval, yet were it adjudged to have been adverse, the result would then be that William thereby acquired wrongfully a fee, to which the plaintiff in error would now be entitled.

To meet this argument the defendant in error will be driven to contend, — first, that either, on general principles of law, or, having regard to the retrospective effect of the new Statute of Limitations (3 & 4 Wm. IV. c. 27), the entry of William was insufficient to determine the base fee in the moiety in question, the title to * which moiety therefore continued to be refer- * 822
able to that fee; or failing in this argument, then, secondly, that either on general principles, or, having regard to the retrospective effect of the enactment, the continued possession of William was not the possession of his coparcener, and not only that the effect of such possession was to gain wrongfully a fee in the moiety in question, but that the new fee so acquired became, by construction of law, impressed with the uses to which the will of George limited the base fee.

In answer to the first of these propositions, the plaintiff in error submits that, as regards general principles of law, admitting that where an estate tail had been discontinued and turned to a right to be asserted by formedon, the remitter (which operates independently of entry) of the one co-heir in tail coming to the wrongful estate in the entirety, did not extend to the moiety of which he was *in* by a different and adverse title, and in respect of which the other co-heir might have had his formedon, yet that where, as in the present case, the right of entry in respect of the estate tail remained in full force, and the issue in tail had one and the same title to enter, the same reasoning does not apply. The entry generally of the one coparcener was, as in the common case of descent

to coparceners, the entry of the other, who could not, without a subsequent ouster, have maintained an ejectment against her companion. As regards the statute (3 & 4 Wm. IV. c. 27), it simply operates to abrogate the former doctrine, that where one of several co-tenants had been in the possession or receipt of rents of more than his share to his own use, such possession or receipt, unexplained, was referable to the common title, so as to keep alive for

an indefinite period the right of the one party out of possession against the * other in actual possession ; thus establishing (for its own purposes only) the converse presumption ; but it does not affect to determine the character and consequences of an entry by one of several co-tenants.

In answer to the second of the above propositions, the plaintiff in error submits, first, that as regards general principles, without some act on the part of William amounting to an ouster or denial of the title of the co-heir (and it is clear that his mere possession or receipt, and retention of the rents of the entirety would not have that effect), the unity of the title of the coparceners was not disturbed ; but the special verdict furnishes no evidence of any such act : Secondly, that as regards the statute, the consequences which would obviously result from construing it as an *ex post facto* declaratory law, by which the aspect of titles resting upon transactions concluded at any antecedent period, however remote, by parties competent to bind all the interests, may be wholly changed, and that too in favour of third persons not claiming under the common title, demonstrate that such a construction was not within the contemplation of the legislature, which, while studious to circumscribe the assertion of rights, could not have intended to restore rights which, independently of the effect of possession continuing at the time of passing the Act, had, before the passing of the Act, been destroyed by the acts and deeds of parties competent by such acts and deeds to bind all the interests : And, thirdly, assuming William to have gained, by the effect of his continued enjoyment of the moiety in question, a wrongful estate, that estate was not a continuance or an enlargement of the base fee alleged to have been devised by the will of George, but a new and substantive acquisition in fee simple, which could

* 824 not, without * an actual conveyance by William, become subject to the limitations of the will of George, on which limitations the defendant in error founds his claim.

The plaintiff in error further submits, that by virtue of the deeds of lease and release of 1814, and the recovery then suffered, and of the deeds of lease and release of March and May, 1818, and the recovery suffered in 1818, and the several other assurances stated in the verdict, the lessors of the plaintiff in the action of ejectment, or some of them, were entitled to recover the undivided moiety in question; and therefore the judgment of the Court of Exchequer of Pleas, deciding in favour of the plaintiff in error for the entirety of this estate, ought to be restored. [For the authorities cited in support of the various points of the argument for the plaintiff in error, see p. 827.]

Mr. Humphry and *Mr. Roundell Palmer* for the defendant in error in the first writ of error, and plaintiff in the second: —

Upon the facts stated in the special verdict, no title is shown in the lessors of the plaintiff, or any of them, to that moiety of the property in question, in respect of which the judgment of the Court of Exchequer of Pleas was reversed by the Court of Exchequer Chamber, even if a title in them, or some of them, be shown to the other moiety. The entirety of the property, or, at all events, one moiety of it, is now vested in the defendant in error as tenant for life in possession under the will of George Woodroffe, from the time of whose death, in 1779, the devisees claiming under his will have been in the uninterrupted possession and enjoyment either of the entirety of the premises, or at all events of this moiety, without any entry by the issue in tail claiming * under the settlement of 1710, or any remitter to *825 such issue, who at the death of the testator were under no disability.

If the effect of the conveyance by Hester Woodroffe in 1735 was not to accelerate and bring into possession the remainder or reversion in fee, then vested in George Woodroffe, her son, as the heir at law of Robert Woodroffe, subject to a right of action only to accrue on the death of Hester to the issue then entitled under the entail created by the settlement of 1710, — which it is submitted was the true effect, — then the effect of such conveyance was to vest the entirety of the premises in question in the testator George Woodroffe for an estate in fee simple, determinable on failure of issue of Robert and Hester Woodroffe, and defeasible by the entry of the issue in tail under the settlement of 1710, within the time pre-

scribed by the old Statute of Limitations. That estate continued vested in George Woodroffe till the time of his death, and passed by his will, and afterwards became and is now indefeasible, either as to the entirety of the premises, or at all events as to that moiety in respect of which the judgment of the Court of Exchequer of Pleas was reversed by the Exchequer Chamber.

The period from which the Statute of Limitations began to run against the estate tail created by the settlement of 1710 ought to be computed, from the death of Hester Woodroffe in 1767, at which time either a right of action or a right of entry accrued to George Woodroffe, as heir in tail, but he, being then in possession of the entirety of the premises under his title, either to the reversion in fee, or to the base fee created by the conveyance of Hester

Woodroffe in 1735, was estopped by the several deeds of * 826 that date, including * the recovery, and by the deeds of 1765, or by some of them, from being remitted to his estate tail under the settlement of 1710. And inasmuch as the operation of this estoppel was only to prevent him from taking advantage of his right of action or entry, and not to prevent the right of action or entry from accruing, it could not and did not suspend the running of the Statute of Limitations during his life.

But if the estate tail was not absolutely barred when William Billinghamurst (afterwards Woodroffe), took possession of the premises in 1790, and even if he was himself remitted to an estate tail as to that moiety of the premises, of which he was heir in tail under the settlement of 1710,—the contrary of which is contended for,—his entry operated in law to vest in him the possession of the other moiety of which he was not heir in tail under the settlement, according to the title which he actually had thereto as devisee for life under the will of the testator George Woodroffe. The effect of William Woodroffe's acts, between the time when he took possession in 1790 and the date of the recovery of 1818, was to estop him and those claiming under him from setting up any title in him to the premises in question,—or at all events to that moiety of the premises of which he was not heir in tail,—adversely to the title of the devisees under the will of George Woodroffe. The right of the issue in tail, under the settlement of 1710, to the premises in question,—or at all events to that moiety of them,—was absolutely barred before the time when the recovery of 1818 was suffered.

Mr. Turner replied. — The following authorities were referred to and commented on in the course of the arguments: —

On the effect of the deed poll as a covenant to stand *seised, creating a base fee: *Co. Litt.* 18 a; *Machell v. Clarke*, 2 Lord Raymond, 778, S. C. 2 Salk. 619, and 7 Mod. 18; *Roe v. Tranmer*, 2 Wilson, 75; *Doe v. Salkeld*, Willes, 673; 1 Cruise Dig. 90, 4 Cruise Dig. 115, and 5 Cruise Dig. 395 (3d ed.); 1 Barton's Points in Conv. 92; Notes to *Took v. Glascock*, 1 Wms. Saund. 260; *Goodright v. Mead*, 3 Burrow, 1703; *Stapilton v. Stapilton*, 1 Atkyns, 2; *Massy v. Batwell*, 4 Drury & Warren, 58; *Doe dem. Lewis v. Davies*, 2 Meeson & Welsby, 503. And that the base fee was devisable: *Doe dem. Cooper v. Finch*, 4 Barnewall & Adolphus, 283.

On estoppel against G. Woodroffe's entry by reason of the recovery suffered by him in 1735: *Co. Litt.* 352; *Right dem. Jeffereys v. Bucknell*, 2 Barnewall & Adolphus, 278.

On merger: *Amy Townsend's Case*, Plowd. 111; *Stone v. Newman*, Cro. Car. 427; 2 Bl. Comm. 177; Cruise on Fines, 274; *Symonds v. Cudmore*, 4 Mod. 1; 3 Preston's Conv. 257, 341, and 345.

On entry and remitter: Statute of Uses, 27 Henry VIII.; Statute of Wills, 32 Henry VIII.; Littleton, §§ 659 (with Butler's note), 690, 693, and 695; *Co. Litt.* 163 b, 242, and 373 b; *The Case of Fines*, 3 Rep. 87; *Hawtreys Case*, Dyer, 191 b; *Anon-ymous*, Dyer, 351 b; *Penyston v. Lyster*, Cro. Eliz. 896; *Smales v. Dale*, and *Duncombe v. Wingfield*, Hob. 120 and 254; *Crompton v. Lord Morley*, Winch's Rep. 5; Bro. Abr. tit. Entry; Comyns's Dig. tit. Remitter, B. 3, C. 6; Preston's Shep. Touch. 73; *Doe v. Prosser*, Cowp. 217; *Doe v. Pearson*, 6 East, 173; *Doe d. Barnett v. Keen*, 7 Term Rep. 386; *Curtis v. Price*, 12 Ves. 89 and 97; Sugden on Powers, 172.

On the operation of the Statutes of Limitations (21 Jac. I. c. 16, and 3 & 4 Wm. IV. c. 27, § 12): *Cotterell v. Dutton*, 4 Taunton, 826; *Tolson v. Kaye*, *3 Broderip & Bingham, *828 217; *Doe dem. Thompson v. Thompson*, 6 Adolphus & Ellis, 721; *Culley v. Doe dem. Taylerson*, 11 Adolphus & Ellis, 1008, and 3 Perry & Davison, 539; *Nepean v. Doe dem. Knight*, 2 Meeson & Welsby, 894.

On election under the will of G. Woodroffe, preventing remitter, equal to disclaimer: *Birmingham v. Kirwan*, 2 Schoales & Lefroy,

444 ; *Townson v. Tickell*, 3 Barnewall & Alderson, 31 ; and *Stacey v. Elph*, 1 Mylne & Keene, 195.

LORD BROUGHAM, at the close of the argument: This case has now occupied four days in argument, very usefully and instructively, because the case has been very ably argued. It is a case of very considerable importance to the law, because principles are ventilated and argued, founded upon opinions which are in the nature of first impressions ; and it requires therefore a more careful consideration on the part of your Lordships before you finally dispose of it. I congratulate your Lordships on having the assistance of the learned Judges to guide our inquiries into these points, and I propose that you shall put this question to them : “ In the state of titles and facts generally found by the special verdict, what estate or estates did the plaintiff in error take, and what estates did the defendant in error take ? ” This will, I think, embrace the whole case. At the same time I should not be dealing fairly with the case, and with your Lordships, if I did not add that there are certain points upon which I should wish to have the opinion of the learned Judges, though I do not expect them to answer them as if they were questions formally put to them by your Lordships. [His Lordship then proposed several minor * 829 questions, and said he expected to find in the * answers of the learned Judges great assistance in finally disposing of the main question.]

July 27.

BARON ALDERSON. — My Lords, your Lordships have proposed the following question of law to her Majesty’s Judges: “ In the state of the titles and facts generally found by the special verdict, what estate or estates did the plaintiff in error take, and what estates did the defendant in error take ? ” And I am now to deliver our answer, and the reasons for it to your Lordships.

It will not be necessary in this case to state the facts of the special verdict at length, because they are already very fully and correctly stated in the judgments of the Courts below.¹ Nor, indeed, after the very elaborate manner in which the question has been discussed, both in the Court of Exchequer and afterwards in

¹ 10 and 15 Meeson & Welsby, 608, 769.

the Court of Error, will it be necessary to state at any great length the reasons for the answers which her Majesty's Judges have now to give to the question put to them by your Lordships.

We think, then, that it is clear, first, that by the deed poll of 1735, executed by Hester Woodroffe, a base fee was created. The case of *Machell v. Clarke*,¹ seems to have decided this point. There it was held that a deed, which was a covenant to stand seised, being an innocent conveyance, created an estate of inheritance, or a base fee determinable on the failure of the estate tail; and the reasons assigned by Lord Holt for the decision in that case are plainly applicable to the present case. Indeed this point has never been seriously contested in the arguments at the bar.

* It is, however, suggested, that, although this was so, * 830 this base fee merged in the reversion in fee, which, at the time of the execution of the deed creating it, was vested in George Woodroffe. But we think it did not. Because the intermediate estate tail, which, being preserved by the Statute *De Donis*, was still subsisting, prevented, by its interposition, any such merger from taking effect. This was the state of things at the death of Hester Woodroffe. On her death, however, George Woodroffe entered into the estate. If this entry had been under ordinary circumstances, it would, no doubt, have put an end to the defeasible estate, the base fee previously created. But it is clear that here George Woodroffe took the defeasible title by his own act and consent; he was a party to the recovery suffered in consequence of and contemplated in the deed creating the base fee; and a person so taking the defeasible title cannot be remitted to his better title, being estopped by his own acts from setting it up. George Woodroffe, therefore, we think, remained holding the estate under the defeasible title which came to him, and the base fee continued until his death in 1779.

Then it appears that the trustees under his will entered and held the estate. The two co-heirs in tail, the Reverend William Billinghamurst and Mrs. Caverley, made no entry at all, and so did not put an end to the base fee. But in 1790 a new state of things arose: William Woodroffe, the great-nephew of George, then entered into possession, no doubt intending to claim under the will of George; but though this was his intention, we think the law is clearly established by the passage cited from Littleton, sec-

¹ 2 Ld. Raymond, 778.

tion 695, where he says : " If a man be disseised, and the disseisor let the land to the disseisee by deed poll, or without deed, * 831 for a * *tér*m of years by which the disseisee entereth, this entry is a remitter to the disseisee. For in such case, where the entry of a man is congeable, and a lease is made to him, although he claims by words in *pais*, that he hath estate by force of the lease, or saith openly that he claimeth nothing in the land but by force of such lease, yet this is a remitter to him, for that such disclaimer is nothing to the purpose." In truth the entry of the party always operates to restore him to his older and better title, whatever he may intend to do when he enters. This point is fully argued, and we think satisfactory reasons are assigned for it, in the judgments of both the Courts of Exchequer and Exchequer Chamber, to which we do not wish to add any thing.

It is true, however, that, if by the operation of the Statute of Limitations, William Woodroffe's right of entry, as co-heir in tail, had been taken away, his entry into the estate might not have had this operation. But the facts of the case give an answer to this difficulty. The true construction of the Statute of Limitations is to hold that it bars those only who, having an available right of entry, have omitted during the statutable period of twenty years to exercise it. Now in this case no one had an available right of entry till 1779 ; for although Hester Woodroffe died in 1769, yet on her death George Woodroffe, being estopped by his own acts, as we have before mentioned, had no available right of entry as heir in tail. On his death, however, in 1779, the time of limitation began to run. But then in 1790, when William Woodroffe entered, only eleven years had elapsed ; it was therefore quite competent for William Woodroffe, had any one else then been in possession under George's will, to have made an entry, and * 832 asserted his right as tenant in tail ; and * his entry in 1790 must therefore, we think, have that effect given to it.

William Woodroffe, therefore, in 1790 was, as we think, remitted to his older and better title, according to the rule of law stated by Littleton. What then was the title which he so had ? He was one of the co-heirs in tail, and entitled under that to a moiety of the estate ; as to the residue, he had only the defeasible title, the base fee. Mrs. Walker was the other co-heir, and en-

titled as such co-heir to have entered and defeated the base fee as to her moiety. The reason assigned for the remitter taking place as to the estate of William Woodroffe is hardly applicable to her. For though William Woodroffe could not sue himself by a writ of formedon, and therefore must be in by his remitter, this reason is plainly inapplicable to Mrs. Walker's case.

It is indeed said that the entry of one coparcener is an entry of both, and that so the entry of William Woodroffe, by which he was remitted, was an entry also by Mrs. Walker, and therefore that she also was remitted as to her moiety, and the whole base fee defeated; and for this *Smales v. Dale*¹ was cited. It may be well doubted whether the third manner of entry by a coparcener, mentioned by the Court there, viz. an entry where one coparcener claimeth the whole expressly (which is the present case, for William Woodroffe here clearly entered under the then supposed good title created under Hester and George Woodroffe's deed and recovery) could be an entry by the other coparcener at all. For Coke Littleton, 373, seems quite contrary to this extrajudicial opinion of the Judges in *Smales v. Dale*. But we agree with the Court of Exchequer Chamber in thinking, that after the Statute * 3d & 4th William the Fourth, chapter 27, section * 833 12, this cannot be so. There seems no doubt that this Statute has a relation back, and makes the possession of one coparcener no longer the possession of the other. If so, the possession of William Woodroffe here was not the possession of Mrs. Walker at all; and therefore, although by that possession he was remitted to his older and better title, in order to avoid the absurd consequence of his being reduced to sue himself if he wished to hold the estate under it, yet Mrs. Walker not being in possession, and not having entered so as to defeat the base fee under which William Woodroffe held the other moiety, the base fee as to this moiety still remained in William Woodroffe till defeated. It is not necessary to go further, for the mere lapse of time, independently of the acts done by Mrs. Walker and those claiming under her, have now made the base fee no longer defeasible as to this moiety of the estate.

The answer, therefore, which we propose to give to your Lordship's question is, that George Woodroffe, the defendant in error, takes an estate for life in a moiety of the estate, inasmuch as Wil-

¹ Hobart, 120.

liam Woodroffe, his brother, had that moiety as tenant for life only under the will of George Woodroffe, the base fee as to that moiety never having been defeated, and that the plaintiffs in error take the other moiety in fee.

LORD BROUGHAM.—I am sure your Lordships feel much indebted to the learned Judges for the great attention they have bestowed on this nice and difficult case, — nice and difficult, I mean, in some parts of it, though I confess that I, while attending to the argument, held the opinion at which the learned Judges have arrived. I had much communication with them in the * 834 course of the argument, and I took leave, besides * the main question submitted to them, — I took leave, for the purpose of more fully elucidating the subject, to call their attention to certain points which I put in the form of queries, as to whether George Woodroffe took a base fee, or an estate *pour autre vie*, that is, determinable on the death of Hester; secondly, upon the question of merger; thirdly, upon the point of estoppel; and, lastly, upon the question of the application of the old Statute of Limitations, and the Statute of 1833 (3 & 4 Wm. IV. cap. 27), an Act which I brought in at the recommendation of the Real Property Commissioners.

I have now had the advantage of hearing, in common with your Lordships, the opinion of the learned Judges, delivered by my learned friend Baron Alderson, and I have been favoured also with the written answers of two of the learned Judges to the additional queries, in which answers all the others coincide, and they came to the opinion to which I expected they would come from what passed at the hearing. But it was fit that these points should be all maturely considered; for this is a case which will be hereafter cited as having a great and important influence on this branch of the law of real property.

Although I am prepared now to move your Lordships to give judgment in accordance with the opinion of the learned Judges now delivered, I think it will be as well to look into the printed cases before we apply that opinion to the law, for which reason I propose that it shall stand over till Monday next, and that the opinion now delivered be printed in the mean time.

LORD CAMPBELL.—I have no doubt that your Lordships will be governed by the opinion of the learned Judges, which has * 835 been delivered in a manner so highly satisfactory * by the

learned Baron ; but I quite agree with my noble and learned friend that the proper course will be to have this opinion printed, and that the case may be further considered on Monday.

July 31.

LORD BROUGHAM. — This case was argued before the learned Judges when I occupied the chair, in the absence of my noble and learned friend the Lord Chancellor ; my noble and learned friend Lord Campbell also was present. We had a good deal of argument with the learned counsel at the bar, and a good deal of discussion with the learned Judges, whose invaluable assistance we had the advantage of having. To nine different queries which I put to the learned Judges they have given their opinion. It was in order to have a *constat* upon the points which we discussed among ourselves, while the argument was going on at the bar, that I put them those questions. [His Lordship stated the substance of the questions.]

All those points were put to the learned Judges, and having been considered by them, the result of their opinion is, that the plaintiff in the first writ of error is entitled to one moiety of the lands in question, and the defendant to the other moiety. That satisfies the plaintiff in the first writ, but the defendant is not quite satisfied with that. The ejectment was brought against him to disturb his title in both cases. Then the result is that he brings his, the second writ of error, and he is minded to have possession of the moiety which the judgment of the Court below and of the learned Judges gives to the plaintiff in the first writ.

The result appears to me, agreeing, as I entirely do, with the learned Judges in their opinion upon all the * points, * 836 to be, that the parties, as it were, quit the Court, so to speak, as they came into it. That the plaintiff in each writ of error fails, and the defendant in each keeps his moiety, that is, both parties retain each his moiety. That results, therefore, in this, that I have to recommend to your Lordships, agreeing with the learned Judges, to pronounce for the defendant in error in both cases.

LORD CAMPBELL. — I entirely agree with the opinion delivered by Baron Alderson, in his own name, and that of six of his absent

brethren. There is no difficulty in applying it to the record. There were eight Judges present when the case was argued. We are unfortunately prevented, by death, from having the opinion of one of them, my learned friend Mr. Justice Coltman. He at one time, as I have understood, entertained doubts upon the subject, and his having entertained such doubts made me hesitate, because he certainly was a very profound lawyer; but I am very glad to hear that his doubts were removed, and that the learned Judges are unanimous in the opinion delivered to us. I entirely concur in it, and I agree with the recommendation of my noble and learned friend.

LORD BROUGHAM. — I furnished my noble and learned friend with the queries which were put to the learned Judges, so that the whole subject has been brought before him.

The judgment of the House will be for the defendant in error in each case. That is, the judgment in the Exchequer Chamber stands, correcting the judgment of the Court of Exchequer. We say nothing of the costs, because those on one side balance those on the other.

* 837 * DRUMMOND v. THE ATTORNEY-GENERAL.

1848. February 24, 28, 29; March 2, 6. 1849. July 31.

THE REV. WILLIAM HAMILTON DRUMMOND and	} <i>Appellants.</i>
another,	
THE ATTORNEY-GENERAL FOR IRELAND, at the re-	} <i>Respondents.</i>
lation of GEORGE MATTHEWS and others, . . .	

Deed of Trust. Protestant Dissenters. Unitarians. Evidence.

In the year 1710 certain members of Protestant Dissenting congregations in Ireland subscribed sums of money for charitable purposes, and for the management of the fund executed a deed, which recited that the objects of the trusts thereof were: 1st, to support the Protestant Dissenting interest against unreasonable prosecutions; 2d, to educate youth designed for the ministry among Protestant Dissenters; 3d, to assist poor Protestant Dissenting congregations; and 4th, for such other pious and religious ends, and by such means as the subscribers should think proper for promoting these objects: —

Held, — affirming the judgment of the Court of Chancery in Ireland, — that Unitarian Protestant Dissenters were not within the trusts of the deed.

The terms "Protestant Dissenters" not having acquired a known legal meaning in 1710, evidence may be received to show what was their meaning in a deed of that date, — such as contemporaneous documents and usage, the acts of the party, and the circumstances in which he was when he made the deed, but not his particular opinions or declarations.

Although contemporaneous usage and long enjoyment afford grounds for the interpretation of doubtful words in a trust deed, they give no sanction to a breach of trust.

A decree, which declares Trinitarian Protestant Dissenters only to be entitled to a trust fund, is right in removing from the trust such of them as concurred in the misapplication of the fund.

THIS appeal was brought against a decree made by Sir Edward Sugden, Lord Chancellor of Ireland, in the year 1842, in a suit instituted there, by information at the relation of the respondents, for the purpose of regulating a charity founded in Dublin in the year 1710, for the benefit of "Protestant Dissenters." By the *decree it was declared that Unitarians were not enti- * 838 tled to participate in the charity. 3 Drury & Warren, 165.

The information (filed in April, 1840) stated, among other things, that on the passing of the Act of Uniformity (17 & 18 Car. II. c. 6), several Presbyterian ministers, then in the enjoyment of parochial benefices in Dublin and other parts of Ireland, having declined to conform to the provisions of that statute, withdrew from their parochial cures, and with some of their parishioners formed five Non-conforming or Protestant Dissenting congregations, agreeably to the Presbyterian form and discipline, and erected five meeting-houses in Dublin, viz. in Wood Street, in Cook Street, in New Row, in Plunket Street, and in Mary's Abbey: That these five congregations, being all agreed upon the doctrine of the Trinity as an essential article of faith, and their ministers having selected godly persons out of their respective congregations as elders, after the manner of the Presbyterian Church, united in an ecclesiastical association, called a Presbytery, for the government of their internal affairs, known by the name of "The Dublin Association or Presbytery"; and that from their origin to the year 1702, the ministers of these congregations regularly taught and preached the doctrine of the Trinity: That in 1702, the Rev. Thomas Emlyn, minister of the Wood Street congregation, having avowed that he held Unitarian opinions, was removed by the Presbytery from the pastoral charge of the con-

gregation, and was subsequently prosecuted, found guilty, and sentenced to fine and imprisonment for having promulgated Unitarian doctrines in a book entitled "An Humble Inquiry into the Scripture Account of Jesus Christ": That the Presbyterians or Protestant Dissenters in Ireland, from the time of * 839 * their separation from the Established Church in 1665, were all, except Mr. Emlyn, agreed amongst themselves, and with the Established Church, upon articles of faith and the objects of Christian religious worship, dissenting from the then Established Church only upon questions of Church government.

The information further stated, that in the year 1710, Sir Arthur Langford, with others, members of the said five congregations, and believers in the doctrine of the Trinity, subscribed large sums of money for the charitable purposes thereafter set forth, and that in order to secure the due management of the fund so formed, the founders thereof executed a deed of trust, dated the 1st of May, 1710, which recited that, "from a pious disposition and concern for the interest of our Lord Jesus Christ, and the welfare of precious souls, Sir A. Langford and Joseph Damer, Esq., with divers other well-disposed Christians, had designed and intended to set on foot a stock or fund for the support of religion in and about Dublin and the south of Ireland, by, first, assisting and supporting the Protestant Dissenting interest against unreasonable prosecutions, some of which they had lately been exposed to; secondly, for the education of youth designed for the ministry among Protestant Dissenters; thirdly, for assisting Protestant Dissenting congregations that were poor, and unable to provide for their ministers; and fourthly, for such pious and religious ends, and by such means, as should by the subscribers thereunto be thought proper and reasonable, for promoting the design and intention therein expressed: And that the several subscribers had mutually engaged to employ the utmost of their integrity and faithfulness, with all necessary care and diligence, in the * 840 * pursuit of the rules and methods thereafter unanimously agreed to by them, and which should or might be thereafter added, for the accomplishing and carrying on so good a work."

The deed then stated twelve rules or provisions (all which were set forth in the information) for the management of the fund then subscribed, and such additional funds as should from time to time

accrue. The third rule proceeded thus: "and since a corporation by charter is not on this occasion to be expected or attempted, and seeing deeds of trust and conveyances are still liable to many contingent hazards and inconveniences, it seems best to place the great security of the present undertaking (next to the blessing and protection of God) upon the faithfulness and integrity of the persons herein named to be trustees, being the ministers of the several Dissenting Protestant congregations associated in Dublin, and two out of each of their congregations, and the other persons hereinafter named, viz. the Rev. Mr. Joseph Boyce" (then followed the names of nine other ministers of the five congregations, and ten members thereof called elders, and seven other persons, also called elders, who subscribed large sums), "whom we do hereby constitute, &c. trustees and managers of the said fund, together with all and every the additions that shall be made thereunto; and that they, or the major part of them, being eleven at least of the whole number, duly summoned, who shall be in and about the city of Dublin, shall order, manage, and set out at interest, or otherwise to the best advantage, as to them shall seem most fit, the present fund, together with the additions and revenue thereof from time to time, to the uses, intents, and purposes aforesaid." The eighth rule provided for a succession in the * trusteeship, by covenanting that, "as often as any of the * 841 said members" (the ten ministers and ten elders) "die or be displaced, that in the room of a minister, such other minister as shall regularly succeed to such congregation, shall succeed to the said trust; and in room of any of the said members of a congregation, one of the said congregation shall be chosen by ballot, — all which shall be done by the unanimous agreement of the said trustees, or three fourths of them present," &c. The ninth rule was to the effect that as often as any deed, gift, &c. should be made for the use of this fund, it would be advisable "that it be made to two of the trustees, not ministers, and that it be expressed to be made to them, to such pious and charitable uses as they should think fit, without any mention of this fund; and that thereupon the same, as well as any already made, shall be taken to be to the uses of this fund, and under the regulations therein mentioned." The tenth rule was, that when any such deed or grant as aforesaid, be made, or any security by bonds, mortgages, &c. be taken, the same should be made to two of the said trustees, not

ministers, and not many to the same persons. The eleventh rule required newly elected trustees to indorse on the deed their acceptance of the trust, and to act with the other trustees with all diligence and faithfulness in the execution of the trust, according to the covenants and rules in the deed mentioned; and the twelfth provided for the investment of the fund, then amounting to 1500*l*. — “which sum, with the interest and increase thereof, with what additions should be made thereto by any person whatever, the trustees” (after declaring their acceptance of the trust) “promised and declared should be and remain to the uses, intents and purposes aforesaid; and that they would from time to time, follow the articles and rules as prescribed, and which should afterwards be added for the better government of the fund and the registry of the donors and their subscriptions, and for executing the trust, and every particular with the utmost fidelity.”

The information further stated, that all the original trustees believed in the doctrine of the Trinity, and that up to a recent period the entire income of the fund was applied, according to the trusts of the deed, for the benefit of Trinitarian Protestant Dissenters; that the Wood Street congregation had united with that of Cook Street, and removed to a meeting-house in Strand Street; that the congregation of New Row had removed to Eustace Street, and the congregation of Plunket Street had joined a congregation of Trinitarian Presbyterians on Usher's Quay; that the said congregations of Strand Street and Eustace Street, lately abandoning their ancient faith, had adopted what are called Unitarian opinions, and the Reverend Joseph Hutton and Dr. Ledlie, ministers of Eustace Street, and Dr. Drummond, minister of Strand Street, congregations, taught and preached Unitarian doctrines, and the lay elders and members of these congregations were of the sect called Unitarians; but that the ministers, elders, and members of Mary's Abbey and Usher's Quay congregations still maintained their ancient faith, being Trinitarian Presbyterians.

The information then submitted, that according to the true construction of the said deed, it was inconsistent with the trusts thereof to apply any part of the funds in aid of teachers of doctrines at variance with belief in the Trinity, or with belief in the divinity of Jesus Christ, yet that the greater part of the income of the trust fund was applied by the present trustees —

* the majority of whom were Unitarians — to the propaga- * 843
tion of Unitarian doctrines, at variance with the Trinity as
held by the Established Church, and by the said five Protestant
Dissenting congregations, at the date of the trust deed. And the
information, after stating the alleged misapplications of the trust
fund, prayed that the charity might be established according to the
true construction of the said deed ; that it might be declared that
ministers and preachers of what is commonly called Unitarian be-
lief and doctrine, or persons entertaining such religious opinions,
were not fit objects of the charity ; that all allowances thereout to
Unitarian preachers should be discontinued ; that it might be de-
clared that such Protestant Dissenters only as are commonly called
Trinitarians could be considered as coming within the intent of
the founders ; and that such of the trustees as should be found to
hold doctrines at variance with those of the founders might be re-
moved from the trust, &c.

All the trustees of the charity (reduced to twenty) were made
defendants. Fifteen of them joined in one answer, and — admit-
ting that eleven of these, including the appellants, were Unitarians,
(the other four being Trinitarians) — they said they could not
set forth whether the original ministers of the said five congrega-
tions all agreed upon the doctrine of the Trinity as an essential
article of faith, but believed some of them did ; and they denied
that all Protestant Dissenters in Dublin, from the year 1665 to
1735 (except the Rev. Mr. Emlyn), were agreed among them-
selves and with the Established Church upon articles of faith (as
stated in the information), and they insisted that the only principle
recognised by them as fundamental was the rejection, in matters
of religion, of human authority, and of all creeds and tests,
* and the recognition of the Bible alone as the rule of faith. * 844
They further answered that, according to the true construc-
tion of the deed of May, 1710, the trustees were not restricted in
the application of the funds to any particular sect of Protestant
Dissenters, and that it was not inconsistent with the trusts thereof
to apply portions of the funds in aid of Protestant Dissenters who
taught or preached Unitarian doctrines ; and that it did not ap-
pear from the deed to have been the design of the founders of the
charity to exclude Unitarians from its benefit.

The other five defendants, all Trinitarians, put in separate an-
swers, but took no further step in the cause.

A large body of evidence, consisting, in a great part, of historical documents, and extracts from sermons and theological and controversial works published by the original trustees, ministers of the five Dublin congregations, prior and subsequent to the foundation of the charity was received.¹ The other evidence given by the relators was directed to prove that the founders and original trustees, and their successors for a long time, were not merely Trinitarian Protestant Dissenters, but that they had in various ways manifested the utmost abhorrence of Unitarians and their doctrines.

By the decree, dated November, 1842, it was declared² that ministers or preachers of what is commonly called Unitarian belief and doctrines, and the students and congregations and others holding, or professing to hold, Unitarian belief and doctrines, are not fit objects of, and are not entitled to participate in, the trusts or the funds created by the deed of 1710, and that the said defendants (eleven Unitarians, and the four Trinitarians who concurred with them in the application of the funds) be removed from
 * 845 being trustees or managers of the charity ; * and it was referred to the Master to appoint proper persons to be trustees in their place, in conjunction with the five remaining trustees (Trinitarians who did not concur with the former) ; and the Master was to take the usual accounts, and all the parties were to be paid their costs out of the charity funds.

The income of the charity, consisting of lands near Dublin, purchased with the trust funds, and of money in the public stocks, was about 700*l.* a-year at the date of the decree.

The appeal was brought by two of the Unitarian ministers and trustees.

Mr. Rolt and *Mr. Roundell Palmer* for the appellants : —

This charity, from its foundation in 1710 to the date of the decree, continued to be managed by the successive ministers of the five Dublin congregations, the principal founders of it, and by the lay members of these congregations, elected from time to time for the purpose, according to the provisions of the deed of trust. The information was not filed by members of these congregations, but at the relation of George Mathews and other Presbyterians, wholly unconnected with them, claiming the charity for their own

¹ See 1 Drury & Warren, 363, 381.

² 3 Drury & Warren, 165.

sect exclusively. There was no clause or provision in the deed of foundation indicating an intention to confine the charity to that, or any other sect of Protestant Dissenters. The deed recites that the charity was designed by Sir A. Langford, J. Damer, and other well-disposed Christians, for the support of religion in Dublin and in the south of Ireland: first, by assisting the "Protestant dissenting interest" against unreasonable prosecutions; secondly, by the education of youth for the ministry among "Protestant Dissenters"; thirdly, * by assisting "Protestant Dissenting * 846 Congregations," poor and unable to provide for their ministers; and, fourthly, for such other "pious and religious ends" as the subscribers should think proper. Unitarians as well as Presbyterians were, or might be, comprised in each of these descriptions of the several objects of the charity: they were, like all other "Protestant Dissenters," liable to prosecutions as being contrary to law, there being no Toleration Act in Ireland until the year 1719; they were "poor Protestant Dissenting Congregations," and any aid to them fell within "the pious and religious ends" of the subscribers.

The first objection to the decree is, that the charity was illegal at the period of its constitution. Protestant Dissenters in Ireland, whether Unitarians or Trinitarians, had then no legal *status*; they were in the same position as Roman Catholics were before the passing of the Emancipation Act (1829), and all trusts for the protection or promotion of their religious principles were void. The language of the deed of trust in this case shows plainly that the subscribers and founders were aware of the illegality of the charity.¹ There were in force in Ireland several Acts, in effect preventing the recognition and the existence of any Dissenters from the Established Church (2 Eliz. cap. 2; 17 & 18 Car. II. cap. 6; and 2 Anne, cap. 6). That was the state of the law until the passing of the Toleration Act (6 Geo. I. cap. 5, Irish) in 1719, which recognised, and, to some extent, relieved Protestant Dissenters without distinction of sect, upon taking the several oaths and the declaration therein prescribed. The benefit of that Act, it is true, by the 13th section of it, was not to extend to any person who, by preaching or writing, * denied the * 847 doctrine of the Trinity as it is declared in the thirty-nine articles. But as the Act did not require subscriptions to

¹ See the 3d and 9th Rules, *supra*, pp. 840, 841.

any doctrinal article of the Established Protestant Church, Unitarians had from that time a legal existence, upon taking the prescribed oaths, if they did not write or preach against the Trinity.

That being the effect of the Act of 1719, the question arises, was it retrospective, so as to make valid this charitable trust of 1710, which was unquestionably invalid at the time of its creation? Two cases were cited in the Court below on that point: *Bradshaw v. Tasker*,¹ and *The Attorney-General v. Todd*.² In the former, Lord Brougham (Chancellor) held that legacies given in 1823 in trust for Roman Catholic Schools, a trust then invalid, were made valid by the subsequent Act 2 & 3 Wm. IV. c. 115, for securing charitable bequests of Roman Catholics, which, in connection with the Emancipation Act in 1829, his Lordship declared to be retrospective. Doubts have been entertained on the correctness of that decision; but, supposing it correct, it is quite consistent with it that the Irish Toleration Act (1719) was not retrospective, and that was the opinion of the Lord Chancellor of Ireland,³ and he is supported therein by the case of *The Attorney-General v. Todd*. In that case an information was filed in 1831, before the passing of the Act 2 & 3 Wm. IV. c. 115, to establish an old gift in trust for a Catholic charity; the Master of the Rolls held the trust to be invalid; but, seeing that the purpose of the gift was charitable, he recommended that an application be made to the King, for his sign manual, to appoint the uses of the gift. The appellants
 * 848 submit that that is the proper * course to be adopted in respect of the trust funds in this case. There is no question that the purposes were charitable.

The Lord Chancellor of Ireland, instead of following the precedent of *The Attorney-General v. Todd*, was of opinion that, in consideration of the very long enjoyment by the trustees, — though the trust was illegal when created, and that their disability was now by law removed, — the Court was warranted in executing the trust.⁴ But this trust, being for a charity, and admitted to be illegal in its creation, the right of the Crown, under sign manual, to apply the charity attached, and the Court had no jurisdiction. The Crown would, no doubt, be influenced in the application of the charity in favour of Unitarians, by considerations of their long

¹ 2 Mylne & Keene, 221.

² 1 Keen, 803.

³ 1 Drury & Warren, 380.

⁴ 1 Drury & Warren, 380.

enjoyment, and that they and their preaching, their chapels and congregations, are now legalized. So also if the Court, in taking the charity under its own jurisdiction, is to give effect to the lapse of time and long enjoyment, its decree should have directed the regulation of the trust on the same footing on which it had been so long administered. It is admitted that the trustees of the fund, for 120 years at least, consisted of persons, more than one half of whom held anti-Trinitarian opinions. All these are excluded by the decree, although it is on their long possession and enjoyment that the title of the persons to whom the whole benefit of the trust is by the decree transferred, is founded. If possession and enjoyment of the fund for so long a time ought to govern the future possession and enjoyment of it in any way, it ought to be for the purpose of securing it to those who so long held it. There is an inconsistency in refusing to enforce the * law strictly * 849 from an unwillingness to disturb long enjoyment, and then proceeding to disturb that long enjoyment in order to give effect to the supposed original intention, which at best was illegal.

The trust funds have been admirably managed ; there was no complaint on that ground, nor imputation cast on the trustees, who have been, since 1740, if not from the foundation of the charity, persons who have held the same religious opinions in respect of Unitarian doctrine and belief as those who are excluded by the decree. Though the majority of them lately were Unitarians, more than two thirds of the income of the charity was distributed among Trinitarians. It was the opinion of all parties from 1710 to the time of filing the information, that the trust was of a general nature, including Unitarians and Trinitarians and other Protestant Dissenters. The descriptions of the beneficiaries of the charity in the deed of trust were of the most general nature ; the terms " Protestant Dissenters " and " Protestant Dissenting Congregations " include all classes of Protestants, — Protestants as against the Church of Rome and Dissenters from the Established Church ; members of both these churches, by the terms of the deed, were excluded.

If the House should be of opinion that the charity was not illegal, then there is no ground for excluding Unitarians from participating in it. They are included in the comprehensive descriptions in the deed. It cannot be said that they are not " Christians," although it is to be observed that in the deed,

well-disposed Christians" were appealed to rather as the contributors or donors, and "Protestant Dissenters" and "Dissenting Congregations" were to be the donees or beneficiaries of the charity. Unitarians were comprehended among "Protestant Dissenters" as effectually as Presbyterians or Trinitarians. No evidence can make the terms "Protestant Dissenters" more intelligible; they have acquired a legal meaning from various Acts of Parliament, and are as incapable of definition as the term "heir at law." There was no expression in the deed of trust to control or restrain their ordinary legal meaning. When terms of an uncertain meaning occur in the construction of a deed or will, evidence may be received of conventional and contemporaneous usage of them, of acts of the party, and the circumstances in which he was placed when he executed the instrument. But when terms, as in this case, "Protestant Dissenters," have acquired a fixed legal meaning from Acts of Parliament, no evidence, not even of surrounding circumstances, is admissible to explain them. That doctrine is laid down by the Judges of the Court of King's Bench, in *Smith v. Wilson*,¹ and more recently in the case of *Lady Hewley's Charities*,² by the Lord Chancellor in moving the judgment of this House, and also by several of the Judges who delivered their opinions on that occasion. The words "Godly preachers of Christ's holy Gospel," contained in the deed in that case, had no known meaning, never having occurred before in any instrument, and consequently required explanation; but "Protestant Dissenters" are found in numerous Acts of the legislature, and have a known legal meaning.³

The Lord Chancellor of Ireland, however, thought there was some ambiguity in the description, and accordingly he received evidence to aid him in the construction of the deed. The inconvenience of that course is quite manifest when applied to the construction of an instrument which is of itself capable of a sensible construction.

The evidence upon which the Court below founded its construction, consisted chiefly of the published works of Mr. Emlyn, "An Humble Inquiry," &c. and "The narrative" of the legal proceed-

¹ 3 Barnewell & Adolphus, 728.

² 9 Clark & Finnelly, 355.

³ See Irish Acts, cited *supra*, p. 846, and 11 Geo. II. c. 10; 19 & 20 Geo. III. c. 6; and 21 & 22 Geo. III. c. 25.

ings taken against him, of which he stated that the Protestant Dissenters of Dublin were the most zealous promoters: and the inference drawn from that circumstance was, that Unitarians, being regarded with horror by those Protestant Dissenters, could not have been among the intended objects of the charity. That Mr. Emlyn was tried and convicted of blasphemy for *holding* Unitarian doctrine there is no question; but it is equally certain that the conviction was erroneous. Whatever might have been the state of the law at that time as affecting Unitarians, it is admitted that they have been for a long time capable of partaking of a charity founded for Protestant Dissenters; that was settled in respect to Unitarians in England, by the answers of all the judges to the sixth question put to them in the case of *Lady Hewley's Charities*.¹ Protestant Dissenters, including Unitarians, are put on the same footing in Ireland by the several Acts passed for their relief, from that of 6 Geo. I. c. 5, the Irish Toleration Act, to the Dissenters' Chapels Act, 7 & 8 Vict. c. 45.

The authors of this trust, consisting of the ministers and members of the five Dublin congregations, must have been well aware of the existence, at that time, of anti-Trinitarian opinions to a great extent, in Dublin and elsewhere in Ireland. The trial and conviction of Mr. Emlyn had then recently (1703) taken place.

* Numerous publications and controversial tracts, from the *852 year 1690, had attracted the public attention, and excited men's minds in a violent degree. It is impossible to believe that, if the founders of this charity intended to exclude persons holding anti-Trinitarian opinions from its benefits, they would leave such intention unexpressed in the deed. The true interpretation of their silence on the point is, that they had no particular sectarian views in establishing the trust, their motive being to have a fund available for the protection of the civil rights of all Protestant Dissenters, without reference to doctrine, against the prosecutions of the Episcopalians. That was the first and the principal object of the trust, to which the other objects were subordinate. The five congregations of Dublin were called "Protestant Dissenters," not "Presbyterians," as the Trinitarian Protestants of the North of Ireland were called. These insisted on the adoption of a creed or articles, but the Protestant Dissenters in Dublin, and of the South of Ireland, repudiated all creeds and doctrinal subscriptions.

¹ 9 Clark & Finnelly, 509, 524, 539, 544, 556, 565, and 578.

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¹ 9 Clark & Fennelly, 509, 524, 539, 544, 556, 565, and 578.

The debates between the two bodies, for many years, on the subject of obtaining a legislative toleration, developed the differences which existed between them in regard to subscription to creeds and tests, and the Toleration Act was obtained at last, in 1719, without subscription to any test.

Of the five congregations, whose ministers and members founded this charity by way of a defence fund for themselves and their posterity, three have become Unitarians. It is impossible to ascertain the period when the change of opinion began, or when or by whom the first breach of trust, as declared by the decree, was committed. The present trustees are the ministers and mem-
 * 853 bers of the congregations, the successors * and representatives of those who established the trust fund ; they are the persons contemplated by the founders as the parties who should succeed to the trust ; they can all trace an unbroken succession to the original founders and trustees, from whom several of them are lineally descended. If the decree removing these trustees be upheld, how can their places be supplied conformably with the deed of trust, which requires that the ministers of the congregations, *ex officio*, and lay members or elders, by election, should be the trustees perpetually ? The effect of the decree is to deprive these three congregations of all connection with, and benefit from, the trust fund. The trustees representing the other congregations, that of St. Mary's Abbey, and another, are continued in the trust on the ground that they are Trinitarians, and did not join the Unitarian trustees in their answer, justifying their application of the trust funds. These, however, cannot be the only trustees of the charity ; so that if the decree be upheld, some foreign bodies, strangers to the trust, must be introduced into the administration of it. It is also to be observed, that among the removed trustees are four Trinitarians, who joined in the answer with the eleven Unitarians. A decree which declares that Trinitarians only are entitled to the administration and benefit of the trust, and yet removes trustees of that class of Protestant Dissenters, is inconsistent, and cannot be sustained. It is submitted that the decree is altogether wrong, and ought to be reversed.

Mr. Kindersley and *Mr. Malins* for the respondents, after noticing that the appeal was brought by only two of the re-
 * 854 moved trustees, both Unitarian ministers, proceeded *to

maintain the following propositions; First, that the founders of the charity were all Trinitarians and Presbyterians, and the evidence received in the Court below, to show the founders' intention and in explanation of the terms "Protestant Dissenters," was rightly admitted:¹ Secondly, that at the date of the deed of trust, there were no Unitarian congregations in Dublin or in the South of Ireland, and persons who professed Unitarian opinions were regarded by the Protestant Dissenters of Dublin with the utmost abhorrence:² Thirdly, that the application of any part of the trust funds for the benefit of Unitarians was inconsistent with the scope and language of the trust deed, which should be construed according to the intention of the founders:³ Fourthly, that it was not competent to the appellants, after their long enjoyment of the charity, to argue that it was illegal in its origin; that such illegality was not adverted to in their answers or arguments in the Court of Chancery, but was the suggestion of the Lord Chancellor of Ireland, who nevertheless maintained the charity;⁴ and fifthly, that the purposes of the trust fund, as expressed in the deed, were perfectly legal, that these purposes were not for universal benevolence, as suggested by the appellants, but for the protection and maintenance of Trinitarian Protestant Dissenters, whose ministers were recognised and remunerated by stipends from the Crown, and annual grants from the Irish Parliament. The arguments and authorities cited by the learned counsel in support of * these propositions were nearly the same as those used for * 855 the respondents in the case of *Lady Hewley's Charities*,⁵ which, they submitted, was, in most of its points, similar to this, and the judgment of the House in it ought to govern their Lordships' judgment in this case.

Mr. Rolt, in reply, again contended that the trusts were illegal originally, and that no Court would execute trusts illegal in their nature; *The Attorney-General v. Pearson*,⁶ that the only way to give effect to such a charity was, by recommendation of the Attorney-General to the Crown to appoint by sign manual the objects of the

¹ *The Attorney-General v. Pearson*, 3 Merivale, pp. 400, 401, 418, 420; and *Shore v. Wilson*, 9 Clark & Finnelly, at p. 355.

² *Emlyn's Narrative*, passim.

³ *Craigdallie v. Aikman*, 1 Dow, p. 6; and *The Attorney-General v. Pearson*, 3 Merivale, at p. 400.

⁴ 1 Drury & Warren, p. 753.

⁵ 3 Merivale, p. 399.

⁶ 9 Clark & Finnelly, p. 480 to p. 497.

charity, as was done in the case of *The Attorney-General v. Todd*;¹ that if the charity was to be maintained, that class of persons, who and whose ancestors had so long administered and participated in the charity, ought, on the grounds of contemporaneous usage, long enjoyment, and prescription, to be favored; that if choice was to be made between two classes of claimants to the benefit of a trust fund, in its nature illegal, the class that could show long and undisturbed possession should be preferred, but the appellants did not, as the respondents did, claim exclusive title; that the terms "Protestant Dissenters" having acquired a fixed legal meaning from numerous Acts of Parliament,² as comprising Unitarians, evidence even of surrounding circumstances to explain their meaning in the trust deed was inadmissible, and that the House could not, in deciding this case, be governed by previous decisions, the only previous cases in *pari materia* being *The Attorney-General v. Pearson* and *Shore v. Wilson*, which were cases of valid trusts,

* 856 and were * decided on the grounds of misapplication of the funds, and the evidence in them both was properly admissible in explanation of words of uncertain meaning, as "for the worship and service of God" in the former, and "Godly preachers of Christ's holy Gospel" in the latter; but if for either of these phrases, the words "Protestant Dissenters" were substituted, there could be no dispute as to their meaning, and evidence could not be received.

In support of these arguments he read passages from Milton, Locke, Drs. Arnold and Hampden; and, as to the inadmissibility of the evidence, he referred to the opinions of the Judges, in answer to the first of the six questions put to them in the case of *Wilson v. Shore*, 9 Clark & Finnelly, pp. 499, 511–514, 555–560, and 565.

1849. July 31.

LORD BROUGHAM. — I attended at the hearing of this case with my noble and learned friend near me (Lord Campbell) and my noble and learned friend Lord Cottenham, whose absence, on account of indisposition, we have to lament. He has, however, considered this case, and after communicating with us on the subject, he has sent me a corrected copy of his judgment, which I will read to your Lordships, and in which I entirely coincide. The

¹ 1 Keen, 803.

² Vide supra, p. 850.

case is of great importance ; and whatever opinion we might have had before the case of *Lady Hewley's Charities*, I do not consider that we can do otherwise than the Court of Chancery in Ireland did, that is, to follow the principles laid down in that case.

His Lordship then read Lord Cottenham's judgment, as follows : —

“ It appears to me that the rules and principles * acted * 857 upon in the case of *Lady Hewley's Charities*, govern the present. The cases indeed are very similar. In *Lady Hewley's Charities*, the principal question was, the meaning of the founder's words, ‘ Godly Preachers of Christ's Holy Gospel ’ ; and whether Unitarians were included in that description. In the present case the question is the meaning of the founders' words, ‘ Protestant Dissenters ’ ; and whether Unitarians are included in that description. In *Lady Hewley's Charities*, the evidence used below embraced a wide range, much of which was probably not properly receivable ; but there was sufficient evidence free from all objection to enable the Judges and this House to come to a satisfactory conclusion upon the meaning of the words, and the disqualification of Unitarians.

“ In commenting upon the opinions delivered by the learned Judges upon the question of the admissibility of evidence in the case of *Lady Hewley's Charities*, I observed that the evidence which went to show the existence of a religious party, by which the phraseology found in the deed was used, and that Lady Hewley was a member of that party was clearly admissible, being in effect no more than evidence of the circumstances by which the author of the instrument was surrounded at the time.¹ The appellants in this case, indeed, attempted to distinguish the two cases, upon the ground that, although no distinct meaning could be attributed to the mere words, ‘ Godly Preachers of Christ's Holy Gospel,’ the words ‘ Protestant Dissenters ’ had a known legal meaning, and therefore in the absence of ambiguity, evidence of the meaning of those words could not be * received. It is clear that * 858 the words of themselves have not any such known legal meaning as the appellants would attach to them. The expression, ‘ Protestant Dissenters,’ do indeed of themselves imply that the parties are Protestants against the Church of Rome, and Dissenters from the Church of England, but that is all. They cannot

¹ 9 Clark & Finnelly, p. 580.

include all those who are neither of the Church of Rome nor of that of England, for that would include all those who reject Christianity altogether; nor all those who, to some extent, admit the divine mission of Christ, for do not the Mahomedans do that? What classes, and what descriptions of persons are included, is uncertain from the terms used, and therefore matter of proof. The appellants indeed refer to Acts of Parliament and other documents, for the purpose of showing that Unitarians have been included in the general terms of Protestant Dissenters. If this be admissible for the appellants, it is clearly open to the respondents to adduce evidence to prove that such was not the sense in which the words were used by the founders of these trusts, which is in truth the whole question.

“It appears to me clear, that upon the principle of the case of *Lady Hewley’s Charities*, and within the limits acted upon in that case in this House, evidence of the meaning of these words ‘Protestant Dissenters,’ as understood and used by the authors of these trusts, is admissible.

“Some important points are certain from the deed itself, such as that the trust originated with the members of certain congregations of Dissenting Protestants in Dublin; that they professed that the charity was founded upon a pious disposition and concern for the interest of Our Lord Jesus Christ; and that its
 * 859 * object was the support of religion in and about Dublin and the South of Ireland, by assisting and supporting the Protestant dissenting interest against unreasonable prosecutions, and for the education of youth designed for the ministry amongst Protestant dissenting congregations that were poor and unable to provide for their ministers. It is established beyond all doubt that these congregations professed Trinitarian doctrines; that there were not at that time any Unitarian congregations or ministers in Dublin or the South of Ireland, although there were individuals who professed those doctrines.

“Looking then to the declared objects of the trust, those who had no congregations or ministers, and who had not in the opinion of the founders been subject to any unjust prosecutions, could not have been in the immediate contemplation of its authors; but still they may have had intentions so liberal and enlarged as to embrace objects not immediately contemplated, but such objects must have been within their general intentions and within the mischief

they proposed to guard against. They must have been Protestant Dissenters within the sense in which the authors of the trust understood and used this description. The inquiry, therefore, is, were Unitarians or Unitarian Christians included in this description, as so understood and used? The evidence I think proves that they were not.

"The quotations in evidence from members of those congregations, at or about the period of the trust, prove the abhorrence in which they held the Unitarian doctrines. This cannot be more strongly expressed than in the extract from the sermon of Samuel Mather, who says: 'If any man deny one God and three Persons, deny the Scriptures, the Deity of Christ, the immortality * of the soul, the resurrection of the body, or such like * 860 fundamental points, it is the duty of the church to cast him out; he is unclean.' So his brother Nathaniel Mather says: 'This belongs to Christ; he is God, co-equal with the Father and the Holy Ghost, being one of the blessed perfections of the Divine essence.' And after speaking of the opinions of Papists, Socinians and their followers, he says: 'Grotius indeed does the same, and I learn that Arminians and Socinians do so too; but I do not reckon Grotius, or them, among Protestants.'

"Many other extracts to the same effect were produced; but that which is most conclusive is what appears in Emlyn's history and narrative, and the reply to it by Mr. Boyce, one of the authors of this trust. Emlyn complains of these congregations and their members as having taken part against him, and the Irish convocation in their address to the Crown claim credit for having so done, and declare that there are no people in the world, whose principles and practices are more opposite to Deists, Socinians, and all the enemies of revealed religion, and to Papists, than they were, and ever had been.

"It is useless after this to refer to more evidence upon this point. The authors of this trust at the time it was created were professed Trinitarians, and not only disclaimed all connection with, or sympathy for those who professed Unitarian doctrines, but held them in abhorrence, and publicly declared such to be their opinions, denying that such Unitarians were Protestants or Christians. Can it then be supposed that these authors of the trust in question intended to associate with themselves as *cestuis que trust*, those whose doctrines they so abhorred and condemned? Is

* 861 *not the sense in which the words 'Protestant Dissenters' were used by the authors of this trust made clear beyond all question? They denied the right of Unitarians to the appellations of Protestants or Christians, and could not therefore intend to include them in the description of Protestant Dissenters.

"It appears to me, therefore, that the decree of the Lord Chancellor of Ireland was correct, in declaring that Unitarians are not entitled to be considered as objects of the trust.

"Other objections were raised to the decree, which may be disposed of in very few words. It was said that there being at the time no Toleration Act for Ireland, the whole trust was illegal; now if the illegality were proved, the question would arise, how can these appellants raise that objection, they claiming under the trust, and showing no other title to be heard?

"Secondly, it was urged that long enjoyment gave title to the Unitarians. Contemporaneous usage is, indeed, a strong ground for the interpretation of doubtful words or expressions, but time affords no sanction to established breaches of trust.

"It was also objected that the decree removed some Trinitarians, as well as the Unitarian trustees; but this was sanctioned by the decree in *Lady Hewley's Charities*, and is right upon principle. The decree proceeding to correct a breach of trust, removes those trustees who were the authors of it, for that is of itself a sufficient ground of removal, common to both classes. I therefore advise your Lordships to affirm the decree, with costs."

LORD BROUGHAM then stated his own opinion thus: The only point upon which I entertain the least doubt is, whether his

* 862 Lordship (Lord Cottenham) does * not express too doubtfully the inadmissibility of some of the evidence which was received in the Court below in the case of *Lady Hewley's Charities*: but I think he is quite right in his argument upon the admissibility of the evidence which was received in this case, and that the evidence was admissible in this case for the purpose of showing the circumstances in which the party was when making the instrument. You admit it as you admit evidence in construing a will, not to modify the expressions of the will, not to affix a sense upon the will which it does not bear, not to tell you what the meaning of the will is, but to tell you what were the circumstances in which the testator was when he used those expressions, for the

purpose of enabling you to ascertain what meaning he affixed to the expressions that he used, and for no other purpose. There was nothing further done in this case, and it is clear that the evidence was admissible.

I therefore entirely agree with the view taken by my noble and learned friend, and move your Lordships that this appeal be dismissed, and that the judgment of the Court below be affirmed, with costs.

LORD CAMPBELL. — As my noble and learned friend has alluded to the case of *Lady Hewley's Charities*, I have no difficulty in saying that I am clearly of opinion now, speaking judicially, that there was a great deal of evidence admitted in that case which ought to have been rejected. There was abundant evidence to support the decree, of course ; we are now bound by that decree, because it has received the sanction of this House, and I think that the evidence which was admissible there was abundant for the purpose of supporting the decree. But there were, in that case, admitted and reasoned upon by the * Vice-Chancellor * 863 of England, and partly by Lord Lyndhurst, declarations made by Lady Hewley as to the particular sense in which she used particular words, — or rather evidence tending to show the sense in which the words were used by her. Now that, I apprehend, was clearly inadmissible. On general principles I adhere to what I contended at your Lordships' bar, as counsel in the case of *Lady Hewley's Charities*, and which I find the Lord Chancellor of Ireland has done me the honour to adopt, and to say that it is the canon by which he himself has been guided, viz. that in construing such an instrument, you may look to the usage to see in what sense the words were used at that time ; you may look to contemporaneous documents, as well as to Acts of Parliament, to see in what sense the words were used in the age in which the deeds were executed ;¹ but to admit evidence to show the sense in which words were used by particular individuals, is contrary to sound principle, and I think my noble and learned friend the present Lord Chancellor (Lord Cottenham) could not have any doubt at all in rejecting such evidence.

My Lords, adopting that canon, I really do not think that there is any reasonable doubt in this case, because what we have to

¹ *Shore v. Wilson*, 9 Clark & Finnely, p. 413, et seq.

determine is, the meaning of the words "Protestant Dissenters" in the deed constituting this charity, at the time that deed was made,—not what may be the meaning of the words "Protestant Dissenters" in the reign of Queen Victoria, because I have no doubt now that, upon most occasions, Unitarians would be considered as Protestant Dissenters. Since the repeal of the Act of William III. against impugning the doctrine of the Trinity, they have not been liable to any penalties, and it would be
 * 864 * very unchristian to say they are not Christians. They are Dissenters, and, therefore, I apprehend, they may be properly denominated Christian Dissenters, and that they are "Protestant Dissenters."

But at the same time we have to look at what they were when this charity was founded. At that time I think the evidence is abundant to show that the authors of the charity would not at all have considered Unitarians as "Christian brethren"; that they would have looked upon them with great horror, and never would have called them "Protestant Dissenters"; and therefore they cannot be considered as included in the description of those for whom this charity was founded.

That being the case, the decree pronounced by Lord Chancellor Sugden seems to me to be perfectly correct.

Enjoyment might be evidence, if it was doubtful how far Unitarians were included; but assuming that Unitarians are excluded, the enjoyment must go for nothing.

Then as to the other point, that the purposes of this charity cannot by law be carried into execution, and that the funds must be disposed of by the sign manual of her Majesty; I entirely concur in the opinion that that argument cannot be entertained by your Lordships.

I do not think it necessary to enter more at large into this subject, which has been already so ably discussed, but, upon the whole, I entirely concur in the opinion that the judgment of the Court below should be affirmed, with costs.

It was ordered accordingly, that the decree be affirmed, and the appeal dismissed, with costs to be paid by the appellants to the relators, Mathews and Black, who alone answered the appeal.

* IN COMMITTEE FOR PRIVILEGES.

* 865

1846. July 23, 30. 1847. April 20; June 10, 11, 17. 1848. August 11.

THE EARLDOM OF PERTH.

Scotch Peerage. Creation. Limitations. Attainder. Evidence.

On a claim to a Scotch peerage, there being no patent or charter of creation or enrolment thereof discovered, a copy of an enrolment of a commission under the great seal and King's sign manual, dated in February, 1605, directing the commissioners to create James Lord Drummond Earl of Perth, was received and held, in conjunction with subsequent entries in the Parliament records, to be sufficient proof of the creation of the earldom.

In the absence of the instrument of creation of a Scotch peerage, the limitations are taken from usage to be to the grantee and his heirs male general.

On the death of a peer, leaving his eldest son and heir, who had been attainted, the peerage does not vest in him, nor on his death, in the nearest heir male, but is forfeited, as much as if he had been a peer at the time of the attainder.

A peerage limited to a man, and his heirs male, is one entire estate, and no substitution of heirs takes place.

A peerage limited to a man and his heirs male whomsoever is forfeitable under the Act of 26 Hen. VIII. c. 13.

Attested copies of French registers of marriages, births and deaths, *Held* to be admissible evidence, upon the testimony of a French advocate, that such registers were kept according to French law, and would be received in evidence in the French courts.

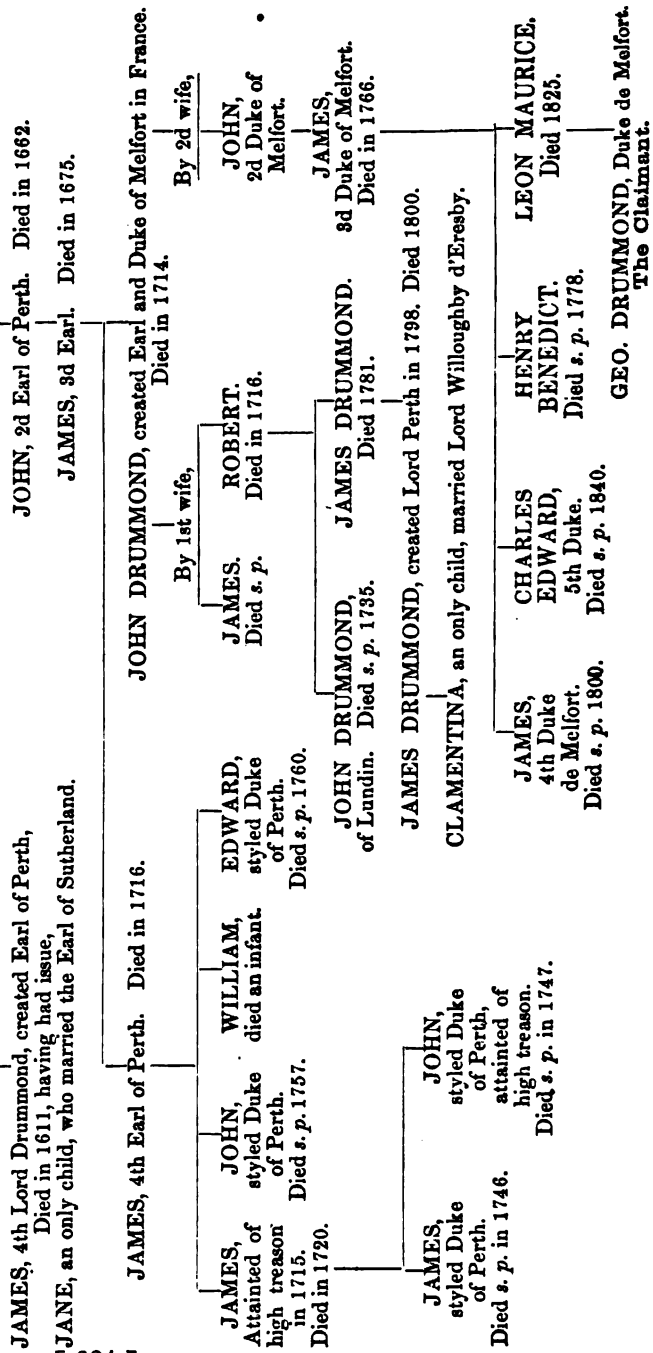
THE petition of George Drummond, Duke de Melfort and Count de Lussan in France, to the Queen, claiming to be Earl of Perth, in the peerage of Scotland, and praying her Majesty to adjudge and declare him to be * entitled to the said Dignity, * 866 was, with her Majesty's reference thereof to the House, brought before the * Lords Committees¹ for Privileges, * 867 first, on the 23d of July, 1846. Her Majesty's Attorney-General, and the Lord Advocate for Scotland, attended their Lordships on behalf of the Crown.

Mr. Fleming, for the Duke de Melfort, opened the allegations of his petition, to the effect following:—

That Patrick Drummond, third Lord Drummond, sat in the

. ¹ There were present (besides the chairman the Earl of Shaftesbury, and other Peers), the Lord Chancellor (Lord Cottenham), Lord Lyndhurst, Lord Brougham, and Lord Campbell.

PATRICK DRUMMOND, 3d Lord Drummond.



Parliaments of Scotland in the reigns of Queen Mary and James the Sixth, and died in 1601, leaving two sons, James and John Drummond surviving: that James, the eldest, succeeding his father, as fourth Lord Drummond, and in 1605 was created Earl of Perth, the Earldom being limited to him and his heirs male; and that on his death, in 1611, having had issue, a daughter, an only child,— who became the wife of the Earl of Sutherland,— he was succeeded by John, his brother and heir male: that the said John, second Earl of Perth, sat in Parliament under that title, in the reigns of James VI. and Charles I., and died in 1662, when he was succeeded by his eldest son, James, third Earl of Perth, who had issue two sons, James and John, and died in 1675, when he was succeeded by James, his eldest son, the fourth Earl of Perth.

That this James, fourth Earl, who filled the office of Lord Chancellor of Scotland to Charles II. and James II., having attached himself to the latter, and being obliged to quit Scotland, joined him in his exile at St. Germain, in France, in 1693, and was by him created Duke of Perth: ¹ that he had four sons, James, John, William (who died an infant), and Edward, and died at * St. Germain, in May, 1716, when the Dignity of Earl of * 868 Perth became dormant, in consequence of the attainder, in his lifetime, of his eldest son James,— by Act of Parliament, 1 Geo. I. c. 32, attainting him of high treason from the 19th of January, 1715, by the style and title of “James Drummond, Esq., commonly called Lord Drummond, eldest son and heir-apparent of the Earl of Perth”: That he, on his father's death, assumed the title of the Duke of Perth, and died in France in April, 1720, having had issue two sons, James and John; that James also took the title of Duke of Perth, attended Prince Charles Edward in his invasion of Scotland in 1745, and died at sea in 1746, never having been married: ² That his brother John, also styled Duke of

¹ Neither this title, nor that of Lord Drummond, is now claimed.

² This was denied in a petition presented to the House by Mr. Thomas Drummond, of New Penshaw, in the county of Durham, stating that he, the petitioner, was the grandson and heir male of the body of the said James, who, being in the rebellion of 1745, and not surrendering himself, was attainted of high treason; that he concealed himself in the county of Durham, was married there, and had children. The petitioner, as his heir, claimed to be entitled to the said Earldom; but he was not represented before the Committee, nor was any notice taken of his claim.

Perth, was an officer in the French army, and was attainted by Act of Parliament (19 Geo. II. c. 26) in 1746, and died in 1747, unmarried: That the male issue of James, who was attainted in 1715, having thus become extinct, the petitioner submitted that the Earldom of Perth vested in his (James's) next brother, John Drummond, as the heir male general of the grantee; and that on the death of that John without issue, in 1757, the Earldom passed to his then next surviving brother, Edward Drummond: That he also died without having any issue, and thereupon the male issue of James, the fourth Earl of Perth, being extinct, that Dignity, the petitioner submitted, descended to the heir male of his brother, John Drummond, as heir male general of James, first Earl of Perth, under the limitations of the original grant.

That this John Drummond, next brother of James, fourth Earl of Perth, was twice married, and was created Viscount and Earl of Melfort and Lord Forth, by letters patent, or charters, dated respectively in 1685 and 1686, limiting these Dignities to him and the heirs male of his body by his second wife, whom failing, to the heirs male of his body, and that King James II. granted letters patent, dated in 1692, at St. Germain's, purporting to create him Duke of Melfort, limiting that Dignity, as the Viscounty and Earldom of Melfort had been limited, and that he and his successors, according to such limitations, were accepted and recognised by the Kings of France as Dukes of that kingdom by that title: That in 1695 a decree of forfeiture was passed against him in the Scotch Parliament, in consequence of his adhering to the Stuart family, but it was in the decree provided that his issue by his first wife should not be thereby prejudiced: That the said John, first Viscount, Earl, and Duke of Melfort, had by his first wife two sons, viz. James who died without issue in his father's lifetime, and Robert, who took the name of Lundin and the estate of that name, in right of his mother: That the said John by his second wife had issue John, second Duke de Melfort, in France, and three younger sons, and died at St. Germain's in 1714: That Robert, his eldest surviving son by his first wife, had issue two sons, John, who died without issue in 1735, and James, who on the death of Edward — styled Duke of Perth — in 1760 became and was served heir male general of James, first Earl of Perth, and claimed that Dignity, and died in 1781, leaving an only son, James Drummond,

who also claimed to * be Earl of Perth, that he was not * 870 recognised as such, but was, in 1793, created Baron Perth in the Peerage of Great Britain, and the Perth estates, forfeited by the attainder of John Drummond in 1746, were restored to him, and he died in 1800, leaving a daughter, an only child, now the wife of Lord Willoughby d'Eresby: That the male issue of John Earl &c. of Melfort, by his first wife, being then extinct, John Drummond, his eldest son by his second wife, and who was born in Scotland in 1682, was heir to all the rights and titles of the family in Scotland, and became Duke of Melfort, in France. He married a French lady, Countess de Lussan in her own right, and died in 1754, leaving James, the only surviving issue of that marriage, third Duke de Melfort, and Count de Lussan in right of his mother. He died in 1766, leaving four sons, three of whom died without issue — two having been successively Dukes de Melfort — and the fourth, Leon Maurice Drummond, who survived them, married in 1794, and had issue a daughter, now the wife of F. H. Davis, Esq., and George Drummond, the claimant, who was born in London in 1807, and in 1840, on the death of his uncle, Charles Edward, became Duke de Melfort in France, and as his learned counsel submitted, Earl of Perth in Scotland, as being the heir male general of James, the first Earl of Perth.

Two questions of great importance arose in this case: the first related to the proofs of the creation and limitations of the Earldom; the second, to the effect of the several attainders of James, eldest son of the fourth Earl in 1715, and of John, second son of James, in 1746, and of the decree of forfeiture in 1695.

As to the first question, Mr. Nairne, writer to the signet, proved that he diligently searched the record * offices in * 871 Edinburgh, viz. the Great Seal, Privy Seal, and Signet Offices, and the Paper Record Office, for an enrolment or entry of the patent or other instrument creating the Earldom, but did not find any. This search extended to five years prior and five years subsequent to 1605. He found, and produced from the repositories of Lord and Lady Willoughby d'Eresby¹ a copy of an enrolment of a Commission or King's Letter, dated at Whitehall, the 11th of February, 1605, authorising the creation of Alexander Lord Jed-

¹ This lady, being the only child of Lord Perth, who died in 1800 (see pedigree), and heir-general of the family, and as such heir in possession of the Perth estates, the document was admitted as coming out of the proper custody.

burgh as Earl of Home, of James Lord Drummond as Earl of Perth, and of Alexander Lord Fyvie as Earl of Dumfermline. This instrument, after reciting that great services were rendered to the king's progenitors by the predecessors of these lords, and that for their own greater alacrity in the king's service, his Majesty was resolved to create them Earls, proceeded, "*Igitur dedimus, &c., tenoreque præsentium, damus concedimus, &c., nostram plenam potestatem et mandatum speciale nostro prædilecto, &c., Johanni Comiti de Montrose Domino Grahame, nostro commissario pro parlamenti nostri infra regnum nostrum Scotiæ tentione, vel casu seu absentia ejus aut inabilitatis, prædilecto nostro &c., Francisco, Erreliæ comiti domino Hay, regni nostri Scotiæ constabulario, talem numerum nostræ nobilitatis vel concilii Scotiæ, prout videbitur expediens, convenire ac omnibus ceremoniis honoribus et solemnitatibus eisdem incumbentibus dictos prædilectos nostros, consanguineos et conciliarios, Alexandrum Comitem de Home dominum Jedburgh*
 * 872 *et Douglas, Jacobum Comitem de Perth dominum * Drummond, Alexandrum Comitem de Dumfermline Dominum Fyvie creandi, et generaliter omnia alia et singula pro creatione ante dictorum honorum et dignitatum faciendi et exercendi in tanto solenni et amplo more, quanto ibidem personaliter interessimus, &c. In cujus rei testimonium hæc presentibus magnum sigillum nostrum apponi præcepimus, &c.*

Per signaturam manu S. D. N. Regis superscriptam, &c.

Hæc est vera copia principalis litteræ supra scriptæ.

(Signed) GEORGIUS HAY, clericus registri.

The witness said that this letter must have passed under the Privy Seal. In his search of the Privy Seal records of the same date, he found in them a deficiency of some years.¹

The same witness produced from the Great Seal Register in Edinburgh, a copy of the patent, "*Carta creationis comitatus de Dumfermline*"; creating the said Alexander, and his heirs male, Earls of Dumfermline. He also produced copies of extracts from the records of the Parliament of Scotland, showing the sitting of the Earl of Perth in the secret councils of Parliament in 1610. It appeared, by an inquisition set forth in a precept of sasine, and also by a royal charter and grant, that he had only one child, a daughter; and to show that he was succeeded in the Earldom

¹ A similar unsuccessful search was proved by other witnesses to have been made in the Privy Seal Office, and other record offices in London.

by his brother John, the same witness produced from the Privy Seal Records a copy of a charter of confirmation, in January, 1613, of a grant made by that John, as Earl of Perth. His (Earl John's) sittings in Parliament in 1612, and subsequently, were proved by the records of Parliament. Several copies of extracts from the same records of anterior * date to the * 873 creation of the Earldom were produced, the first stating that John Drummond of Cargill was made ("*effectus fuit*") a Lord of Parliament, "*nominandus Dominus Drummond,*" in 1487, and the others, showing the sittings of him and his successors, Lords Drummond, down to and including James, third Lord, and father of James the first Earl. Numerous documents, comprising retours, charters, and enrolments of sasines, were produced from the repositories of Lady Willoughby d'Eresby, showing the pedigree of the family and devolution of the Earldom, as before stated, down to the departure of James, fourth Earl, to join the royal exiles at St. Germain. No question arose on the reception of any of this evidence.

To prove the pedigree and state of the family after their departure from Scotland to France, the claimant's counsel offered to put in evidence attested copies of extracts from the registers of marriages, births, and deaths—"registres de mariages, de naissances, et de decès"—kept in the Hotel de Ville at St. Germain, and other places in France. The witness who produced them, and compared them with the originals, proved that they were kept in official places, and under the care of official persons.

The Lord Advocate and the Attorney-General objected to the reception of these documents, insisting that they were matter of foreign law, to be proved by competent witnesses; that it should be proved that the registers were kept according to the laws of France, and that they would be received in evidence in that country.

THE LORDS of the Committee were of that opinion, but received the extracts *de bene esse*, on the understanding that the required legal proof would be given on a future day. Their Lordships added, that a French * law book, referred to by Mr. * 874 Fleming, and entitled "*Recueil General des anciennes lois Francaises,*" by M. Isambert, was not evidence of the French law, and that a French lawyer's evidence would be required.

Accordingly, a French advocate (M. Colin) of forty years' stand

ing, was examined on a subsequent day ; and he, after explaining several terms, as "*qualite*," "*les actes de l'etat civil*," &c., said that the registers above mentioned fell within the latter terms, and would be all, not only received in evidence in the French law Courts, but would of themselves be the proper proofs of the state described in them, requiring only proof of the handwriting of the officer whose signature they bore.

The signatures to these documents were attested by the proper official persons in Paris, whose signatures were attested by the British Consul there, and some of them also by this witness.

The extracts were declared admissible, as were also, without any objection, copies of inscriptions on the tombstones of James, the fourth Earl, who died in 1716 ; and of James, his eldest son (attainted in 1715), who died in 1720, deposited in the chapel of the Scotch college in Paris.

The Act of attainder, passed in 1715 (1 Geo. I. c. 32), and the Act of conditional attainder, passed in 1746. (19 Geo. II. c. 26),¹ were also put in evidence.

* 875 * *Mr. Fleming* proposed to put in a copy of a letter, dated June 7, 1746, written by the Officer of Marine at Nantes, to the Minister of Marine in Paris, stating the arrival at Nantes of a French ship of war, and that the Duke of Perth — James, eldest son of James who was attainted in 1715 — had died on the passage.

The Lord Advocate objected, but on its being shown that the letter was of an official character, and was in the proper repository, the office of the Minister of Marine in Paris, and also that the Duke of Perth, of whose death mention was made, was an officer in the French army, the objection was overruled.

Extracts from the Parliament records in Scotland were produced and received in evidence, showing that John Earl of Perth sat therein in 1612 and 1617 ; and his successors, Earls of Perth, sat therein in 1662, 1672, and 1686. The same extracts showed the like sittings of the Earl of Home, mentioned in the royal commis-

¹ The preamble of the Act named numerous persons, including "James Drummond taking on himself the title of the Duke of Perth," and "John Drummond, taking on himself the title of Lord John Drummond, brother to James, &c. Duke of Perth," and recited that they had taken up arms against his Majesty, &c. and had fled ; it was then enacted that if they should not surrender on or before the 12th of July, 1746, they should, from the 14th of April, 1746, be attainted of high treason.

sion of 1605, although no other instrument for creating that Dignity could be discovered after a similar search, as before stated to have been made in respect to the Earldom of Perth.

Among the various documents produced from the claimant's custody was a royal charter, dated Whitehall, in 1685, creating John Drummond, brother of the fourth Earl of Perth, Viscount Melfort, limiting the Dignity to him and the heirs male of his body, by his second wife, whom failing to the heirs male of his body; and another charter dated Windsor, in 1686, creating him Earl of Melfort, Viscount Forth, and Lord Drummond, with like limitations; and letters patent by King James, dated St. Germain's, the 17th of April, 1692, creating him Duke of Melfort.

* A pedigree, and also a copy of an inscription, purport- * 876
ing to have been engraved on a monument, which was said to have been erected in a chapel formerly belonging to the English nuns at Antwerp, and to have disappeared or been destroyed, were produced, and it was stated by the witness who produced them, that they had been hung up on the wall of the apartment of a relative of the family, who gave the witness copies. It was objected to the reception of them, that the apartment in which they had been kept was the private room of the individual, and that they were not — like an epitaph in a church or churchyard — exposed to the observation and correction of the public, or even of the other relatives of the family. But the witness having stated that the apartment was the relative's general reception room, to which all his visitors had access, the documents were received.

Proof was given of an unsuccessful search in 1844 for monuments of James and John Dukes of Perth, in the buildings which once formed the English nunnery and convent at Antwerp, but were long ago sold and converted into store cellars. Fragments of tombstones with names were found among the rubbish in the vaults.

The chaplain to the Carmelite nuns at Llanherne, in Cornwall, produced a book headed, "An account of y^e seculars buried in our church," and containing an entry (among others) of the burial of "Lord John Drummond, Duke of Perth, 1747." He produced another paper, containing similar entries, including "Duke de Perth, 28 September, 1747," and on the back was written, "All those that have been buried in our church till the year

1778." The nuns came over from Antwerp in 1794, and * 877 brought those documents * with them. One of these nuns was still living, but was not capable of being examined. He further stated this paper was found with other documents by the prioress, in a chest which the nuns had brought from Antwerp. There is a rule of the convent obliging the prioress to keep all documents or muniments in a chest with three keys, of which she keeps one, and two other nuns, called "discreets," keep the other keys. The book was kept in the convent sacristy, because it contained the names of benefactors, for the repose of whose souls the community prayed on certain days, and then the names were mentioned. The book is not seen by any one but the sacristan, the prioress, and the discreets. It is a register of deaths of persons connected with the convent, and is brought down to the present time, and is a book of authority in the convent.

These copies of the entries were received.

A family pedigree, dated 1730, was produced from the muniments of the claimant, and the witness who produced it said the claimant showed it to him in 1825, and it was before that time in the custody of the claimant's father.

Several monumental inscriptions and pedigrees were received without objection.¹

1847. June 10.

Mr. Fleming, in summing up the evidence, said the only points in the pedigree on which, as he believed, any question could be raised, were the proofs of the deaths without issue of * 878 James and John, styled Dukes * of Perth. Of the death of the former at sea, in 1746, the letter of the Officer of Marine at Nantes to the Minister of Marine in Paris, a copy of which was received in evidence, removed all doubt. It stated that one of the ships which had been sent to Scotland to bring away the fugitives, after the failure of the insurrection of 1745, had arrived at Nantes without the Prince (Charles Edward), but bringing Lord Drummond (that is, John, the younger brother), and that the Duke of Perth (James, the elder brother) died on the passage. That statement would be found quite incontrovertible upon consideration of other unquestionable evidence. If he,

¹ So much only of the evidence has been here noticed as was the subject of discussion at the bar, or showed the creation and limitations of the Dignity.

James, had lived to the 12th of July, 1746, the period for surrender prescribed by the Act 19 Geo. II. c. 26, in which he was named among many others, he would have come under its operation, and the Perth estates vested in him would have been forfeited; but it appeared by decrees of the Court of Session, which were put in evidence, and by a decision of this House, that the estates became forfeited by the non-surrender and consequential attainder, not of James, but of the younger brother, John. It was only by the decease of James without issue, before the Act came into operation, that John was capable of taking the estates by descent. In one of the said decrees, dated December 1, 1750, dismissing a claim of Thomas Drummond of Logie-Almond on the estate of Perth, against the Crown, the Court of Session held that James Drummond, described in the Act 19 Geo. II. c. 26, as "James Drummond, taking on himself the title of Duke of Perth," having died on the 13th of May, 1746, before the 12th of July, 1746, on or before which day he was allowed by the said Act to surrender himself and submit to justice, he, the said James Drummond, was not *attainted by the said Act. This House, on appeal *879 against that decree, decided that the estate was forfeited by the attainder of John Drummond, brother of James, taking on himself the title of Duke of Perth.

Another decree of the Court of Session, dated July 15, 1752, contained passages which left no doubt on this point. Its title was a decree "sustaining the title of Mary Drummond upon the forfeited estate of Perth"; and it showed that she was the only sister of the said James and John, and her claim (by bond from their father) made against the Crown, was therein stated to be "upon the estate real and personal which belonged to the deceased James Drummond of Perth, commonly called Duke of Perth, and is now seised and surveyed by order of the barons of the Exchequer in Scotland, as being the estate of John Drummond, taking on himself the style of Lord John Drummond, brother to the said James, &c., and as being vested in his Majesty by and through the attainder of the said John, &c., pursuant to an Act of Parliament made in the twentieth year of his Majesty's reign, for vesting in his Majesty the estate of certain traitors." In another passage it was stated that James, the eldest son, "took the family estate during the life of his father, by virtue of a disposition and infeoffment thereon, burdened with all his father's debts, and on his (James's)

death on the 13th of May, 1746, the estate descended to his brother John Drummond." There were also several letters in evidence, written in 1748, by John Drummond, uncle of the said James and John, speaking of his "late nephew, James, Duke of Perth, deceased," and signing himself as "Perth"; and in one of the pedigrees, and in monumental inscriptions, received in evidence,

*880 James Duke of Perth is stated *to have died without issue, the 13th of May, 1746, and John (his brother), Duke of Perth, in the year 1747.

In the Act 24 Geo. III. c. 57, for enabling his Majesty to restore forfeited estates in Scotland, it was recited, that "the estate of Perth became forfeited by the attainder of John Drummond, taking upon himself the style of Lord John Drummond, brother to James Drummond, taking upon himself the style of Duke of Perth," &c. ; and that "the said John Drummond died without leaving lawful issue of his body, and it was not yet ascertained who was his nearest collateral heir male," &c. It was afterwards, in March, 1785, declared by the Court of Session that James Drummond, great-grandson of John, first Earl and Viscount Melfort, and father of the present Lady Willoughby d'Eresby, was then the heir male of the said John, Lord Drummond (attainted in 1746), and the Perth estates were, by virtue of the said Act, restored to him ; as such heir he had claimed the Earldom of Perth, which was not allowed ; but he was created Baron Perth in the Peerage of Great Britain.

The learned counsel, after directing the attention of the Committee to the material parts of the evidence, sustaining the pedigree and carrying down the dignity, link by link, to the claimant, said, he considered no difficulty could occur, on the ground that he came within the Alien laws, because it was proved that, though his father and grandfather were born in France, he himself was born in London, and his great-grandfather John, second Duke of Melfort, was, as his father, the first Duke, had been, born in Scotland. The claimant's pedigree was established by as clear proof as any pedigree that was ever put in evidence at their Lordships' bar.

*881 *The next question, relating to the creation and destination of the Earldom of Perth, was a mixed question of evidence, and of law arising thereupon and upon contemporaneous usage. It has been clearly proved that James, Lord Drummond,

sat in the Parliament of Scotland in 1604, and that he sat therein as Earl of Perth, in 1610. Between these two periods the Earldom must have been created. It has been shown that the most diligent searches have been made, as well in private repositories as in the Privy Seal and other public record offices in England, as well as in Scotland, for a patent or charter of creation, but none having been found, a copy of a Privy Seal letter, authorising the creation of three lords, James Lord Drummond being one of them, has been received in evidence. That letter does not indicate the destination of the dignities; the same words are used in relation to all the three. Only one of the patents, passed in conformity to that letter, has been found recorded; it is that of the Earldom of Dumfermline, and it expresses the limitations to be to the grantee's heirs male. It has been also proved by evidence, that the Earl of Home, another of the three so created, and whose patent has not been found, sat in Parliament in and previous to the year 1612. Now, it is submitted that it is a clear induction of law from the evidence, that the patent of the Earldom of Perth was in the same terms as the patents of the Earls of Home and Dumfermline, all proceeding on the authority of the said letter. But the case does not rest upon induction or presumption of law, clear and cogent as that would be, because it is proved by inquisitions and other records, that after the death of the first Earl in 1611, leaving only a daughter, his next brother, John, sat in Parliament as Earl of Perth in 1612. His succession, therefore, to the *Dignity, *882 in exclusion of the daughter, clearly and incontrovertibly establishes that the limitations were to the heirs male general of the grantee. The usual limitations of titles at that period were, either to the heirs male of the body, or "heirs male" simply, as in the Dumfermline patent,—sometimes followed by the word "whomsoever." All the peerages created in the reigns of King James the First (the Sixth of Scotland) and Charles the First, are stated in an Appendix to the printed case of one of the claimants to the Roxburgh titles. Of thirty-six dignities created by King James, four were limited to the heirs male of the bodies of the grantees; four, to the heirs male of the bodies of the grantees, whom failing, to the heirs male whomsoever of the grantees; two, to the heirs whomsoever of the grantees; and twenty-six, to the heirs male of the grantees. Of sixty-seven dignities created by King Charles, thirteen were limited to the heirs male of the bodies

of the grantees ; four, to the heirs male of the bodies of the grantees, whom failing, to their heirs male whomsoever ; two, to the heirs whomsoever of the grantees ; two, with peculiar limitations : and the remaining forty-six, to the heirs male of the grantees. It must therefore be presumed from the general usage, and from the evidence before detailed, in the absence of any evidence to the contrary, that the Earldom of Perth was limited to the heirs male whomsoever, or general, of the grantee. The evidence proves that the title has devolved, and has been enjoyed, in accordance with that limitation ; and enjoyment is, in the absence of the patent, the best evidence of the limitations. He trusted, therefore, that the proof of the creation and destination of the dignity were as satisfactory to the committee as the proofs of the claimant's pedigree must have been.

* 883 * The next and principal question relates to the effect of the attainders and forfeiture. There were two attainders : first, of James Lord Drummond in 1715, in his father's lifetime ; the second, of his second son, John Duke of Perth, in 1746. The second may be easily disposed of, because if the first attainder operated a total forfeiture of the title, the second was ineffectual in any sense, there being no dignity left for John to inherit ; and, secondly, if the attainder of James operated a forfeiture of the title only for his life, the attainder of John could not have a greater effect, and must have been inoperative beyond his death in 1747 ; so that in no way can the latter attainder stand in the way of the present claimant.

The forfeiture, which was pronounced in 1695 against John Earl of Melfort, the direct ancestor of the claimant, was not a statutory attainder, but a decree of the Parliament of Scotland at the suit or prosecution of the Lord Advocate ; and there was contained in it a proviso that it should not affect or taint the blood of his children by Sophia of Lundin, his first wife. Admitting that it was a valid decree against the Earl of Melfort, it could not work a forfeiture of the Earldom of Perth, inasmuch as John Earl of Melfort had then no estate in it ; he had only a possibility ; it might or might not devolve on him ; in fact, it never did devolve on him, for he died in 1714, and the Earldom of Perth was at the time enjoyed by his elder brother, who survived him above two years. A mere possibility of succession, a right which may or may not vest, is not forfeitable. That was distinctly decided by this

House upon the recommendation of the learned Judges in the *Camoy's Peerage*.¹ Earlier decisions by * the House * 884 supply ample authorities that this forfeiture against the Earl of Melfort would not work a forfeiture of his succession to the Earldom of Perth. Such was the case of the Earl of Cambridge, who, in the reign of Henry V. (1402), was declared by Act of Parliament to have forfeited that dignity, and was attainted of high treason and executed. He left a son, then an infant, who afterwards on the death of his father's elder brother, the Duke of York (at Agincourt, in 1415) was found to be his heir, and succeeded to that title, notwithstanding the attainder of his father, and was summoned to and sat in this House as Duke of York in the eleventh year of the reign of Henry VI.² The House came to a similar decision in the case of the Duke of Athol in 1764. He was the son and heir of Lord George Murray, the commander-in-chief of Prince Charles Edward's army in the insurrection of 1745, and was attainted in 1746, and died in France in 1760. His elder brother, James Duke of Athol, survived him, and died without issue in 1764. George, the son of the attainted Lord George, claimed the Dukedom, and the House resolved that he was entitled to it, and he was accordingly admitted ;³ and the Dukedom has been ever since held by his successors under that decision, which proceeded on the ground that the claimant could make his pedigree through his attainted father, and that his attainder did not affect a dignity which had not vested and might never have vested in him. The same question arose in 1813, in the case of Viscount Strathallan, and the House came to the same conclusion.⁴ There are, * therefore, three judi- * 885 cial recognitions by this House, at different periods, upon the same state of facts, to establish this conclusion, that the effect of the forfeiture of John Earl of Melfort did not forfeit the right of his descendant to the Earldom of Perth.

There remained yet another question, — the only one which appeared to present any difficulty, — and that was the effect of the attainder of James Lord Drummond in 1715. The same question arose in the first Airlie and in the Lovat Peerages, and was argued at this bar by some of the ablest advocates that ever addressed the

¹ 6 Clark & Finnelly, 789 ; and see pp. 827, 846, 860.

² See the Parliamentary Rolls of 8, 9, & 11 Hen. VI.

³ 3 Cruise, 183.

⁴ Lords' Journals, for 1813.

House; but no decision was given in either of those cases, the legislature having, upon the petition of the claimant and recommendation from the Crown, passed an Act reversing the attainder in the *Airlie Case*, and the claimant in the *Lovat Case* having been created a Peer of the United Kingdom.

Titles of peerage in Scotland, as in England, were in ancient times unquestionably territorial; and after they ceased to be territorial, the rights of succession to them were still regulated by the rules of real property. A dignity when it became separate from the property, was considered in Scotland as well as in England to be a strict entail, or in Scotland "tailzie." In Scotland, before the Union, a Peer might, with consent of the Crown, surrender his peerage, and the Crown might regrant it to him and to a different series of heirs;¹ but without the Crown's consent, the Peer had no power to surrender or otherwise dispose of his dignity, or alter the succession. The King was always, as the fountain of honour, the sole maker of Peers. But Peers of Scotland, since

the union with England, cannot surrender their dignities,
 * 886 nor can the Crown accept them, * or make new grants of them; but every dignity must descend according to the destination prescribed to it at its creation, being as strictly tailzied and as incapable of being diverted by the possessor as an estate in lands, guarded by all the necessary clauses, and duly recorded under the Act of 1685.

The question here partly depends on the construction of the Act 7 Anne, c. 21, in connection with the laws of Scotland. The Act declares certain crimes to be high treason in Scotland, and that the person guilty of such treason shall forfeit as in England; but it does not alter or touch the Scotch estate of the party. There is not much resemblance between an estate tail in England and a Scotch tailzie. In England several estates, including an estate tail, may be carved out of the fee simple; in Scotland, every person in possession under a tailzie has the whole fee vested in him; it is a succession of fees to be taken by different substitutes, as they are called, one by one, to the succession. The fee exists whole and entire, and absolute in each taker of the estate, in intendment of law; although his power over it may be restricted by proper clauses, there is no estate in any of the series except the person in possession; there is a mere possibility that each person

¹ Vide *The Crawford and Lindsay Peerages*, ante, p. 534.

in the series may come to the succession, but that is all ; there is no remainder, no reversion. If the destination of a Scotch estate, besides mentioning the series of substitutes, directs that, upon the failure of the substitutes, the estate shall return to the grantor and his heirs, these do not take any thing of the nature of an English reversion, — they are like the others, mere substitutes, and nothing more.

The state of the law of Scotland in respect to forfeitures, prior to the Statute of 7 Anne, c. 21, was this : * By the * 887 Act of 1685, tailzies, fenced with the necessary clauses and duly recorded, were declared to be perpetual. Supposing that Act to remain unrepealed, destinations made in pursuance of it must remain unbroken. By the Act of 1690 it was provided that no heir of entail should be affected by the forfeiture of his predecessors, except in so far as the attainted persons had power, under the entail, to contract debts and encumber the estate, if the entail were recorded under the Act of 1685. In that state of the law of Scotland, the Act of Anne was passed, assimilating the treason laws of England and Scotland, by applying to Scotland the law of treason as it existed in England. The Act became immediately applicable to Scotch simple destinations, or entails that were not protected with all the necessary clauses, and recorded in conformity with the provisions of the Act of 1690 ; but where the Act was complied with, and clauses irritant and resolute were annexed to the entails to prevent alienation, the party forfeiting forfeited only for his life ; and so the Court of Session decided in numerous cases which came before it after the rebellion of 1715. Although those decisions were considered extra-judicial, by reason of the power over the then forfeited estates being, by the Act of 1 Geo. I. c. 50, placed in certain commissioners, still they showed the opinion of the Court, of what the law was regarding those tailzied estates. The question was again brought before the Court of Session after the attainders for the rebellion of 1745–6, and that Court adhered to the decisions of its predecessors, holding that such estates were forfeited only for the lives of the parties in possession. The principle of the decisions would appear to be that * the in- * 888 terest of each substitute named in the deed flowed from the maker, and, therefore, could not be impaired or affected by the acts of the predecessors of any substitute, his interest being distinct and independent. One of the cases so decided by the Court

of Session, that of Gordon, of Park, was brought under review of this House.¹ The tailzie—which is not correctly stated in the report—was in effect this; to Sir James Gordon, whom failing, to Sir William and the heirs male of his body, whom failing, to the heirs male of the body of Sir James. Sir William was one of those who were attainted in 1746 (by the Act 19 Geo. II. c. 32). The Court of Session found, upon the claim of his brother,—who was not named in the tailzie,—“that Sir William Gordon is by the entail disabled from alienating or encumbering the estate, or altering the course of succession in prejudice of the claimant and other heirs of tailzie, or from impairing their title to the estate after his death, and that therefore the said estate is, by Sir William’s attainder, forfeited to the Crown only during his life, and that after his decease John Gordon, the claimant, hath right to the same.”² On the appeal against that judgment this House called in, and put questions to, the Judges, whose answer was, in substance, “that the estate and interest in the said Barony and lands, forfeited by the said attainder, was not only during the life of Sir W. Gordon, but so long as there should be any heir male of his body; and also the reversionary interest in the fee thereof, limited by the said settlement to the heirs and assigns whatsoever of the said Sir J. Gordon, on failure of the heirs male of his body, and the determination of the several estates by the said other

* 889 substitutions,—supposing that, * by the law of Scotland, such reversionary interest was in Sir William Gordon at the time of his attainder.” The House, adopting that opinion of the Judges, reversed the first part of the interlocutor of the Court of Session, and, after affirming another part of it, further declared,³ that Sir Wm. Gordon (the person attainted) being under the settlement made by his father Sir J. Gordon, dated 19th of October, 1713, seised of an estate tailzie in the Barony and estate of Park, notwithstanding that such tailzie was affected with prohibitive, irritant, and resolute clauses, the said Barony and estate did, by virtue of the Statute of 7 Anne, c. 21, become forfeited to the Crown by the said Sir W. G.’s attainder, during his life and the continuance of such issue male of his body as would have been inheritable to the said estate, in case he had not been attainted; and also for such estate and interest as was vested in, or might

¹ Foster’s Cr. Law, 95.² Foster’s Cr. Law, 103.³ Foster’s Cr. Law, 100.

have been claimed by the said Sir W. G. by virtue of the last limitation in the said settlement to the heirs and assigns whomsoever of the said Sir James Gordon, after all the substitutions therein contained shall be expired or determined; and that by virtue of the substitution to the heirs male of the said Sir James Gordon's body of his then marriage, the respondent John Gordon hath right to succeed to the said Barony and estate after the death of the said Sir W. Gordon, and failure of such issue male of his body as aforesaid, according to the limitations of the said settlement."

That solemn decision of the House, in substance and effect, was, that as far as the interest of the substitutes in the settlement was concerned, no interest was forfeited by the attainder beyond that of the attainted party and his issue, the collateral heirs of entail being * left untouched. Lord Hardwicke, then Lord * 890 Chancellor, in a letter which has been preserved,¹ refers to the difficulties he had in framing the questions for the Judges, so as to confine them to the main point "arising upon the construction of the Act 7 Anne"; and says, "All the Lords concurred that, by the law of Scotland, an estate tailzie with prohibitive, irritant, and resolute clauses is an estate of inheritance, and that, by the same law, no estate or interest in the lands was vested in Sir William Gordon by virtue of the limitation in the settlement to the heirs male of the body of Sir James Gordon, though that would have been clearly otherwise by the rules of the law of England."

(After reading and commenting on several passages in the letter, and applying them in support of his contention in the present case, Mr. Fleming referred for the same purpose to the opinions of Lord Bankton,² and of Erskine in his *Institutes*,³ and then to *Mercer's Case*,⁴—first correcting what he alleged to be evidently errors in Justice Foster's note of it,—and submitted that the present case, though not relating to lands, but to a title of honour, fell within the principle of the decision of the *Case of Gordon of Park*, and ought to be governed by it. But, should their Lordships be disposed to differ from him in respect to that case, he still trusted that, having regard to the limitation of the

¹ Lord Kames's *Elucidations*, p. 381.

² Bk. 4, tit. 4, § 27.

³ 2 Bank. 268.

⁴ Foster Cr. Law, and Elchie's Rep. No. 47; voce "Tailzie."

Perth Peerage to the heirs male general, their Lordships would come to the conclusion that, according to the law of England, that Dignity was not forfeited by the attainder of Lord Drummond.)

* 891 * It becomes necessary to direct their Lordships' attention to the distinction between estates in land, and an estate in a peerage. All estates in land, however numerous and distinct, are carved out of, and constitute only one fee-simple. If any of these separate estates depend on a contingency which does not occur before or at the termination of the prior estate, the contingent estate fails, as there must be always a tenant of the freehold, which is assumed to have always existed. A dignity is quite the reverse; it is called into existence by the Crown, and exists only by and according to the terms of the instrument by which the Crown has created it. The possessor has no control over it; he cannot divest himself of it, or alter its destination in prejudice of the rights of the proper successor; and where the line called to take it fails, there is an end of it; for it cannot revert to the Crown, because the Crown is incapable of holding a peerage, as the House decided in Lord Oranmore's claim;¹ so that there can be no reversion in a dignity, neither can there be a remainder, — it is impartible and indivisible. If one of several co-heirs to a peerage that has been in abeyance be summoned to this House, the whole dignity is in that co-heir as fully as any of his predecessors held it before the abeyance; and that forms another distinction between lands and dignities, that there cannot be an abeyance of the freehold in lands, whereas a dignity may be in abeyance or dormant for centuries.² All the co-heirs would succeed to lands as joint tenants or coparceners, or they might, upon partition, take them in severalty. To these numerous distinctions between

* 892 estates in lands and in a * dignity may be added this, that a grant of lands to a man and his heirs male, whether made by the Crown or by a subject, is void; but a dignity may be so granted, as in the *Devon Peerage*.³ From these distinctions it may be seen that the principles of the law of estates in land are not applicable always to dignities. Anterior to the Statute De Donis, a person having a conditional fee in lands could not forfeit or alienate them before the condition was performed. Since the passing of that statute to the time of the passing of the 26th Henry

¹ Vide infra, 911.

² 2 Dow & Clark, 200, and 5 Bligh N. S. 220.

³ Vide Camoys's Peerage, 6 Clark & Finnelly, 789.

VIII. c. 13, it was a rule of law that a tenant in tail could not forfeit his estate to the prejudice of the next person entitled under the entail. A tenant in tail, in respect to the Act of Hen. VIII., held the entire estate *quoad* the Crown and strangers. He represented every heir of the entail, and any acts done lawfully against him, in reference to the estate, bound the heir, who had no estate or interest distinct or separate from that of the tenant in tail in possession. It was on that principle that a forfeiture by the tenant in tail, under the Act of Hen. VIII., was held to work an absolute forfeiture. It may be assumed that, prior to the 26th Hen. VIII., dignities were not by the common law forfeitable on attainder, because the forfeiture of titles of honour appears to have been effected generally by Acts of Parliament, which recited the treason and conviction of the party, and by express words forfeited the dignities. The Act of Henry VIII. had not for its object to forfeit or affect dignities; the scope and intent of it was to make estates tail in land forfeitable upon conviction of high treason. It enacted that an attainder for high treason should forfeit

* the estate and inheritance vested in the traitor; but un- * 893
less the whole estate tail be vested in him, the attainder could not extend beyond his own interest. If a Barony, created by writ of summons and sitting, fell into abeyance, and there were several co-heirs, the whole dignity was in all of them, and they all made but one heir, until one of them was called up by the Crown; but if, before that, one of them were attainted, the dignity was said by Lord Chief Justice Eyre in the *Beaumont Case*¹ to be forfeited as to all; but this House has recently, in the Camoys and Braye Peerages, and in the Beaumont also, decided in accordance with the opinions of the Judges then taken,² that the attainder of one co-heir did not prejudice the others, and did in no way affect the Barony, and under that decision two peers (Lords Camoys and Beaumont) have taken their places in this House. But analogous decisions, still more in point as to the present case, were pronounced by the House in the cases of the *Earl of Northumberland*,³ *The Duke of Somerset*,⁴ and *Lord Bolingbroke*,⁵ whose interests severally were held to have been preserved under the words of the saving clause of the 26th Henry VIII. c. 13.

¹ 3 Cruise on Dig. 236 to 243 (3d ed.).

⁴ Collins's Peerage.

² 6 Clark & Finnelly, 846.

³ 3 Cruise, 180.

⁵ 3 Cruise, 171.

The title of Lord Bolingbroke was granted in 1712, by patent, to Henry St. John and the heirs male of his body, whom failing, to the heirs male of the body of his father, Sir John St. John. Lord Bolingbroke was attainted in 1715, and died without issue in 1751. If the forfeiture of dignities were identical with forfeitures of estates and inheritance in lands, there is no doubt that the attainder of Lord Bolingbroke would have forfeited and annihilated * the whole of that dignity. Had he the same estate tail in lands, as he had in the Viscounty, vested in him, the whole estate would be forfeited, the whole estate being in him, because he might, by recovery, give himself the fee simple. It was different in respect to the dignity; that had not gone from the collateral heir, because, he might, independently of the attainted party, make his title as heir of the body of Sir John St. John. Accordingly, on the death of the attainted lord in 1754, his grand-nephew the great-grandson of his father, Sir John St. John, claimed and took his seat in this House, his interest under the patent of creation having been protected by the saving clause in the 26th of Henry VIII. The House, in that case, therefore, decided that that which, as an estate tail in lands, would be forfeited upon the attainder for high treason of the person in possession, was saved in a dignity to the collateral heir. That case could not be distinguished in substance from the case before their Lordships; and as they were bound in adjudicating on the effect of high treason, to proceed according to precedent, their decision should be governed by the cases, especially the last, to which he had referred. There was another case, *The Earldom of Oxford*,¹ which was much commented on in the *Devon Case*. It was clearly held by C. J. Crewe and Justice Dodderige, whose opinions were communicated to the House, that if a dignity had been validly granted to a man and his heirs male, the attainder of a person in possession under that limitation would not work an absolute forfeiture of the dignity. In the present case, in which the dignity was limited to James, the first Earl of Perth, and his heirs male, — * 895 which is * not an estate tail, — what prevents the claimant, the collateral heir, from making himself the male heir of that Earl, as he is proved to be, without deriving through the attainted Lord James? Had not the then collateral heir a right to say to the fourth Earl, “ You and your issue male are entitled

¹ Collins's Baronies by Writ, p. 173.

under the patent to be Earls of Perth, for your respective lives, but on failure of your male issue, we are entitled independently of you, deriving our title from the terms of the patent" ? If that existed, it has been protected by the saving clause in the Act of 26 Henry VIII. c. 13.

THE LORD ADVOCATE asked if the learned counsel had any observation to make on the *Airlie* and *Lovat* Cases ?

Mr. Fleming replied that he had nothing to say on those cases.

LORD LYNDHURST. — You have cited numerous cases. Some new cases may be cited in the Lord Advocate's argument, and then, by the indulgence of the Committee, you may possibly be allowed to observe on the cases which may be cited for the first time. But if the other side now suggest that there are other cases, which they mean to cite, it would be convenient that you should now make such observations as occur to you on them.

THE LORD ADVOCATE. — My learned friend is aware of the Cases of *Airlie* and *Lovat*, and that I shall observe upon them, not in an adverse spirit to the present claim, but in my duty as assistant to the Committee.

Mr. Fleming. — The questions involved in both those cases were the questions upon the distinction between Scotch and English law, in relation to estates tail and tailzie, upon which I have addressed my observations to your Lordships. The *Case of Airlie* was not argued before the House in reference to that distinction, * but on another point, viz. that the at- * 896 tainder took place before the party succeeded to the dignity. The House afterwards allowed printed cases to be laid on the table, in which that question was very elaborately argued by Mr. Cranstoun (Lord Corehouse), but it became unnecessary to bring the case again before the Committee, in consequence of the recommendation of the King (George IV.) to have an Act of Parliament introduced to reverse the attainders of Lord *Airlie*, and other Scotch noblemen. That Act blotted out the only question that arose on the attainder, so that no decision was pronounced on it by the House.

The *Case of the Lovat Peerage* was argued with great ability at the Bar, but before any decision was come to, the claimant was raised to a British Peerage by the same title. There is not to be found in the proceedings on that, or the *Airlie* claim, any intima-

tion by the House, or the Lords of the Committee, against the claims. The Lord Chancellor at that time did state the grounds, as well against as in favour of the claim in the *Lovat Case*, and recommended to the committee to adjourn the further consideration of it to the then next session, and there the matter has ever since rested. Neither of those cases can be properly urged as an authority against the present claim; and I do trust that it will be the opinion of your Lordships that the noble claimant is entitled to a recommendation to her Majesty to restore him to the place of his ancestors.

THE LORD ADVOCATE said he was happy to have it in his power to dispense with observations on the claimant's pedigree, because, from the attention which he paid to the evidence on that head, he was satisfied that the pedigree was established. The only point in the evidence which appears to require any comment was,
 *897 *the question which arose on the admissibility and effect of the letter from the officer of marine at Nantes, mentioning the death of James Drummond, the Duke of Perth. That was a point of some importance, both because there was a want of direct evidence of his death, and because there was before the House a petition of another party, claiming to be descended from him. It was, however, shown in answer to the objection to the reception of the letter, that it had an official character; that the Duke of Perth, whose death it mentioned, was in the French service; and the statement, thus shown to be official, has been held admissible in evidence. If the fact of the death of James depended alone on that letter, he would feel it to be his duty to submit to their Lordships that the evidence was not satisfactory; but connecting the letter with other documents, with the restoration of the Perth estate under an Act of Parliament, and with various claims made under that Act against the estate, and seeing that all persons agreed in the statement that James Duke of Perth died at sea in May, 1746, he felt satisfied that their Lordships might safely rely on the facts as stated.

Holding the pedigree to be established, the first question to be considered was, how was this peerage created, and what was its destination. And upon that point also it may be admitted that it was satisfactorily proved that the destination of the Earldom of Perth was to James the first Earl, and to his heirs male general.

Proofs were given of searches for the patent, not only in the family muniments, but also in all the record offices of Scotland, in which such patent, or the registration of it, might be found. The records of Parliament showed the sittings therein of that James * as Earl of Perth, and of his brother John after * 898 James's death, to the exclusion of his daughter and only child. That succession must be taken to imply that the patent of the honour had been granted to the first holder thereof, and to his heirs male; because there was a taking by the collateral heir male, to the exclusion of the lineal descendant, a female. The evidence on this head was made complete and conclusive by the King's letter, authorising the creation of the three lords named to be Earls, and by the production of the patent of the Earl of Dumfermline, one of the three, showing the grant to be to him and his heirs male general, and not the heirs male of his body.

The next, and the principal question in this case and which was involved in the attainders, he approached with much anxiety. James Lord Drummond, eldest son of the fourth Earl of Perth, was attainted of high treason in 1715; his father, then living, died in 1716, and he himself died in 1720; the honours of Perth, therefore, descended upon a person attainted when his turn came to succeed to them. An argument has been raised to show that there is a difference in the operation of an attainder where an honour descends on a person already attainted, and where a person is attainted when he is in possession of the honour. The point is of very little moment, because the attainder operates equally in one case as the other. It may be seen in the opinion given to the House by the Judges in the first *Airlie Case*, upon which the House acted.

Prior to the Act of 7 Anne, c. 21, Scotland had its own treason laws, but by that Act, passed "for Improving the Union of the two Kingdoms," it is declared that high treason, or misprision of treason within England shall be construed and adjudged and taken * to be high treason or misprision of treason * 899 within Scotland; and no crimes or offences shall be high treason or misprision of treason in Scotland but those that are high treason, &c. in England." There was only one estate created by the patent of peerage in this case: it was a grant to one person, and his heirs male general; there was no remainder over to a third person, as in the case of Lord Bolingbroke, and other cases

which have been referred to ; in all of which it was admitted that the whole estate, which existed in the tenant in tail in possession of the honour, and who was attainted, was forfeited ; and accordingly, the persons who succeeded to those dignities claimed them as remainders. The entry in the Journals of the House in *Lord Bolingbroke's Case* was this : " Frederick Viscount Bolingbroke, claiming by virtue of a special limitation contained in a patent granted to his uncle Henry, late Viscount Bolingbroke, dated 7th July, 11 Anne, was introduced in his robes." That was the case of a particular estate or remainder over in the grant of his peerage. Henry, Lord Bolingbroke, had by his attainder forfeited all the estate that was in him, and the heirs male of his body, if he had any, could not take the peerage. Suppose he had sons, and the eldest of them, and not the father himself, was attainted in the father's lifetime, the next brother could not, on the father's death, take his peerage, for that, by descending on the attainted son was forfeited, but the special remainder in the peerage, limited over to another party, still existed.

In the *Duke of Atholl's Case*, the son who would succeed was attainted, and died in his father's lifetime ; the peerage, therefore, did not descend on him, because he died before the honour passed

to him. That case, therefore, was not applicable to the
 * 900 present ; but in the * *Case of Airlie* the question put by the

House to the Judges was precisely in point, being simply, whether, if a person being attainted survives the ancestor, upon whose death the honour would have passed to him, that honour, to come after his attainder, is forfeited ; and the Judges declared that it was, and forfeited to the same intents and purposes as if he had held the honour at the time of his attainder. There being in that case as in this but one estate limited to the grantee and his heirs male, without special limitation or remainder over to any other party, the whole estate was forfeited, and no interest left in any person to be protected either by the Statute De Donis, or by the words of exception in the Statute of Henry VIII. He would not say that there was an adjudication in that *Case of Airlie*, but the argument in it certainly was not successful, and it was unnecessary to resume it afterwards, because the attainder was removed by Act of Parliament.

As to the *Lovat Case*, it was of the greatest importance to the claimant to establish his title to one of the oldest and most dis-

tinguished Baronies of Scotland, and he lamented his inability to do so, although he was by the kindness of his sovereign called up to this House by the same title. The general impression certainly was at the time that his Lordship had little chance, in the opinion of the Committee, of making good his claim.

LORD BROUGHAM. — Nothing to that effect was stated by the Committee. I afterwards, speaking to the Lord Chief Justice on the point, stated to him that I thought it was a question encumbered with considerable difficulty. It was, however, considered an open question.

Mr. Fleming said he had subsequently been counsel for Lord Lovat, and neither Lord Lovat, nor certainly * himself, * 901 ever entertained the slightest suspicion of any adverse opinion being entertained; it was merely a matter of prudence with Lord Lovat, whether his claim should be pressed or not.

LORD LYNDEHURST. — It was a case of considerable doubt, as a second argument was ordered, and Lord Eldon was present, and he, as I understood from my noble and learned friend, considered it a most difficult question. Did he express any opinion?

Mr. Fleming. — It was argued a second time before Lord Eldon, Lord Wynford, and the noble and learned Lord (Lord Brougham) in July, 1831, without any expression of an adverse opinion. The first argument was in June, 1831. No opinion was expressed by Lord Eldon, or by any other Lord of the Committee, save the noble Lord (Lord Brougham).

THE LORD ADVOCATE. — The *Cases of Airlie* and of *Gordon of Park* were referred to in both the arguments, and in one of them, one of their Lordships (Lord Brougham) observed emphatically, that if a case occurred in a state of circumstances similar to those of *Gordon of Park*, he would repeat the decision of Lord Hardwicke; but he did not consider that under the circumstances of an attempt to create a substitution, for the purpose of equalizing the law of treason in Scotland and England, that decision would as a precedent be extended. That was the substance of the noble and learned Lord's observation. Those who argued the *Airlie* and *Lovat Cases* certainly did not succeed in convincing the Committee that a single grant to a man and his heirs could be cut into so many possible limitations as might have been to secure it in the same line of descent. He was therefore entitled to say that the matter was pressed in the argument as of * great importance to * 902

the claimants, and that, although no adverse opinion was expressed, there was no favourable adjudication, though judgment was asked for with as much zeal as a party arguing a case could ask for a judgment in his favour.

The *Case of Gordon of Park* — on which the present claimant founds his case — was this. Sir J. Gordon had tailzied the estate and barony of Park to himself, and after his death to his eldest son, William Gordon, and the heirs male of his body, whom failing to the heirs male of his (the entailor's) own body. Here then were two special limitations, as in the *Bolingbroke Case*. Sir William Gordon succeeded on his father's death, and was afterwards attainted for his accession to the rebellion of 1745, in consequence of which the estate was claimed by his brother, Captain John Gordon, as the next heir of entail, under the second special limitation. The argument used by the counsel for the Crown against the claim was, to the effect that, as by the law of Scotland each heir of entail in possession is the fiar, or owner of the whole conditional fee, he by his attainder forfeits the whole, as well the interest of all heirs substitute of entail as his own. It was assumed to be settled law in Scotland, that when a person is attainted of high treason, he forfeits the whole estate which is in him, and thereby disappoints the other heirs, although he cannot interfere with their rights by voluntary alienation. It was, on the other side, considered very hard that by the law of Scotland this consequence, so affecting the rights of the other heirs, should be ascribed to the forfeiture of the guilty person, putting them in a worse position than heirs of entail are by the law of England, by which the heir in tail takes only a temporary estate, on the termination

* 903 * of which the remainder-man, not affected by the attainder of the previous tenant, would succeed. Lord Hardwicke, anxious to assimilate the law of attainder of both countries, and considering the substitution found in the entail of the Barony of Park to be analogous to a remainder in an English entail, he therefore held, that the attainder of Sir W. Gordon did not forfeit more than the estate given in the first substitution, — to him and the heirs of his body, — and that on the termination of that estate, the substitution in favour of his brother, the next heir male of their father's body, took effect, precisely the same as would be the case in England in favour of a remainder over. The grounds of his Lordship's judgment are stated in his letter already referred

to.¹ But it is to be observed that he proceeded upon an actual substitution, which was of the same nature as the special remainder in the *Case of Lord Bolingbroke*, — he did not do what has been asked in the *Airlie* and *Lovat Cases*, and in the present claim, — he did not attempt to sever a single estate in fee into several independent estates, but finding an actual substitution in the Gordon entail, he considered it equivalent to a special remainder in an English entail. The *Case of Mercer*² is still stronger against, if not fatal to, the present claim.

THE LORD ADVOCATE, after stating *Mercer's Case*, submitted to the Committee that they could not report in favour of the claim then before them, without interfering with the broad recognised principle in the administration of the law of treason as to attainder and forfeiture in this country as well as in Scotland.

* THE LORD CHANCELLOR. — In this case I will in the first * 904 place — following the course which has been taken by my noble and learned friend in the last case³ — express my opinion of the great ability with which the case of the claimant has been brought forward and advocated at your Lordships' bar. This case has received every consideration on my part. I attended to it during the arguments, and I have since read the notes of the arguments on both sides, and the result is that I am under the necessity of stating to your Lordships that in my opinion the claim is not made out.

The document creating this Peerage not being forthcoming, the limitation must be taken from usage to have been to the grantee and to his heirs male. It appears that James, the fourth Earl, held under that limitation, and that he died in 1716. James, his eldest son, was alive at that time, not having died until the year 1720; but in 1715, living his father, he had been attainted. By his father's death the title would have descended upon him, had he not been attainted; but it did in fact — if it can be said to have descended at all — descend upon an attainted person, and it became as much forfeited as if he had been a Peer at the time of his attainder. The first *Case of the Airlie Peerage* is decisive as to this.

¹ Lord Kames's *Elucidations*, p. 381.

² *Elchie's Decisions*, voce "Tailzie."

³ The *Crawford and Lindsay Peerages* (ante, 534), in which Lord Lyndhurst, on the same day, delivering the opinion of the Committee, expressed his approbation of the manner in which that case had been got up by Mr. Riddell.

The claimant says that he is heir male of the grantee, and entitled, upon failure of the line of the attainted party; but if that party had the whole estate in him, the whole was forfeited.

* 905 * It is said, however, that by the law of Scotland each party may be considered as coming in by way of substitution, and that the party attainted forfeits only what was in him; and the *Case of Gordon of Park*,¹ and *Lord Bolingbroke's Case*,² are relied upon for that purpose. But in those cases there were substantive substitutions, which there are not in this case; and Lord Hardwicke adopted that course to assimilate the law of Scotland as nearly as possible to that of England, in pursuance of the provisions of the Statute of Anne.³ Those cases do not affect the present, in which there is no substitution; but the whole is held under one estate. The attempt to apply the rule to such a case was made in the second *Airlie Case*,⁴ and in the *Lovat Case*;⁵ but it was not admitted by the House, though there was no express decision upon the point. In the *Mercer Case*⁶ I cannot but think that the question actually arose, and was decided against the claimant.

If such a substitution of an estate were allowable between a party having an estate granted to him and the heirs of his body, and others who might come in under the same limitation,—as the limitation in this case to a man and his heirs male,—I cannot see any reason whatever why that, which is merely an arbitrary rule, should not be extended a great deal further; and why it should not be introduced as between the party, the grantee himself, and his own son; because, being purely arbitrary, it might just as well be allowed in the one case as in the other. There is no decision,

and no authority, and no reason for altering the terms of
* 906 the *grant which constitute it one estate, and being all one estate at the time the party is attainted, the whole is forfeited; and, therefore, I advise your Lordships to report to the House that the petitioner has not made out his claim.

LORD LYNTHURST.—I am of opinion that the claim in this case is barred by attainder. There are three attainders, or rather two attainders, and a decree of forfeiture; but it is only necessary to

¹ Foster Cr. Law, 95.

² 3 Cruise, 180.

³ 7 Anne, c. 21.

⁴ Vide supra, 890.

⁵ Vide supra, 890.

⁶ Elchies Decisions, 481.

consider one of those, namely, the attainder of James, Lord Drummond, in the year 1715. He was the eldest son of the fourth Earl: he was attainted in the lifetime of his father: his father died in 1716: he survived, and died in 1720. Now, if this had been the case of an English Peerage, there is no doubt whatever that the Peerage would have become extinct by the attainder of James Lord Drummond. I will consider it first in that view.

If an estate be limited by a subject to a man and his heirs male, that estate is not an estate tail, but an estate in fee; if it be granted by the Crown, it is altogether void; but if it be a limitation of a peerage, it has been decided, as in the *Case of the Earldom of Devon*,¹ that such a limitation is valid. The estate is not an estate tail within the Statute De Donis, but a fee with a qualified descent.

If this, therefore, were an English Peerage, it is quite clear that upon the death of the fourth Earl of Perth there would have been an end of the Earldom, because there would have been nobody to succeed. The next heir was attainted; his blood was corrupted; he, therefore, could not succeed; and there being an eldest son, nobody else could *succeed. The Earldom would, * 907 therefore, escheat and entirely cease.

With respect to the law of Scotland, a Peerage by that law may also be limited to a man and his heirs male general, as in this instance. Under such a limitation the Peerage would descend precisely in the same way as in England, first to the lineal heirs, and afterwards to the collateral heirs in succession. As each person succeeded to the title, he would take the fee. But by the Statute of Anne the corruption of blood, and forfeiture and other penalties arising from attainder are applied to Scotland precisely as they are applied to England. It follows, therefore, that, if the Peerage would in the case before us be extinguished if it were an English Peerage, it would be equally extinguished in the case of a Scotch Peerage, and not for the life only of the party attainted, or during the continuance of his issue, but it would terminate entirely.

The *Case of Gordon of Park* is distinguished from the present for the reasons stated by my noble and learned friend. In that case Lord Hardwicke, in order to apply the Statute of Anne to the Scotch law, was obliged, in some degree, to do violence to that law; but in the present case no such violence is necessary; the applica-

¹ 2 Dow & Clark, 200; 5 Bligh, 220.

tion of the statute is immediate and direct. I think, therefore, that the title is barred by attainder, and I am of opinion that the petitioner has failed in establishing his claim.

The Committee accordingly resolved, "That George Drummond, Duke de Melfort, and Count de Lussan, in the kingdom of France, has not made out his claim to the titles, honours, and dignities of Earl of Perth and Lord Drummond."

LORD LYNDHURST, after the next case was disposed of, *908 said: With respect to the last case, that of the *Duke de Melfort, the Crown alone can relieve; but I think I may, without impropriety say, it is a case deserving the serious consideration of my noble and learned friend as to the adoption of some proceedings on the part of the Crown to do away with the effect of the attainder. This has been done in several cases; and I think there is as strong a claim for this relief, in the present case, as in any that have preceded it.

THE BARONY OF CARNEGIE AND EARLDOM OF SOUTHESK.

1848. August 3, 11.

Scotch Peerages. Attainder.

Scotch peerages, created by patents in 1616 and 1633 respectively, and limited to the grantee and his heirs male, descended through the line of his eldest son, and became, in 1699, vested in the fifth Baron and Earl, who was attainted of high treason in 1715, and died in 1729, without leaving issue. His collateral heir, descended from a younger son of the first Peer, claimed the dignities in 1848:—

Held, that the attainder was a bar.

THE allegations of the petition of Sir James Carnegie to her Majesty, claiming the titles of Earl of Southesk and Baron Carnegie of Kinniard, referred by her Majesty to the House, and by the House to the Committee for Privileges, were opened by Sir Fitzroy Kelly on the 3d of August, 1848. Some evidence in support of the claim was taken on the same day. By an original patent, dated in 1716, it appeared that King James created Sir

David Carnegie of Kinniard, Knight, a Baron and Lord of *909 Parliament, by the title of Lord Carnegie of *Kinniard,

with a limitation to him and his heirs male, bearing the surname and arms of Carnegie. He was afterwards, in 1633, by a patent of Charles I. raised to the dignity of an Earl, by the title of Earl of Southesk, with a limitation to his heirs male for ever. He had four sons, and the eldest having died without issue in his lifetime, he was succeeded by James his second son. From that James the said dignities descended lineally, and in 1699 vested in James the fifth Earl and Lord, who was by Act of Parliament attainted of high treason in 1715, for his accession to the rebellion of that period, and died in 1729. He had an only son, who died in 1722, without issue. The issue of John, third son of David, the first peer, became extinct in 1663. Alexander, the fourth son of the first peer, left a son David, whose lineal male heir was the petitioner. The petitioner had not completed his proofs of these allegations.

On the 11th of August, after the Lords of the Committee had disposed of the claim of the petitioner to the Earldom of Perth, Sir Fitzroy Kelly said he was prepared, with the permission of the Committee, to complete the evidence in support of his client's claim, but after their Lordships' decision in the former case, he felt it to be his duty to state that there was some resemblance between the two cases in respect to the attainer. He was not then prepared to argue the question as to the effect of the attainer on his client's claim, with reference to the opinions which were expressed by their Lordships in the *Perth Case*. If it was the pleasure of their Lordships then to hear the remainder of the evidence, he would, before taking any further steps, confer with his learned friends (Mr. Wortley and Mr. Innes) who were with him, and consider how far the one case was *governed *910 by the other. Unless they should find that there was a clear distinction between the cases, they would not feel themselves justified in occupying any further time of the Committee.

The Committee informed the learned counsel that they did not consider it advisable, under the circumstances, to proceed further with the evidence. If the learned counsel, upon consultation, should be of opinion that the present claim could be supported, further proceedings might be taken in the next session ; the present session was nearly at an end.

No proceeding has been since had on the claim.

The following is the case referred to, ante, p. 895.

LORD ORANMORE'S CLAIM.

No Peerage in the Sovereign.

The Sovereign cannot hold a peerage: accordingly, where a member of the Royal Family, who was a Peer of Ireland, succeeded to the Crown, the peerage became extinct.¹

DOMINICK BROWNE was by letters patent, dated the 4th of May, 6 Wm. IV. (1836), created a Peer of Ireland, by the style and title of Baron Oranmore and Browne. In July the same year, Lord Oranmore presented his petition to the House of Lords, praying that his right to vote at the election of Representative Peers * 911 * for Ireland to sit in the Parliament of the United Kingdom may be admitted. That petition came before the Committee of Privileges on the 4th of August, 1836. It was shown by evidence that, prior to the date of the letters patent, three Irish peerages were then recently extinct, as required by the Act of Union (39 & 40 Geo. III.), before a new Peer of Ireland could be created.² These peerages were, the Barony of Kingsland, extinct by the death of Viscount Kingsland in 1831; the Earldom of Connaught, extinct by the death of the Duke of Gloucester and Earl of Connaught, in 1834; and the Earldom of Munster, extinct by the accession of William, Duke of Clarence and Earl of Munster, to the Throne, in 1830.

The Committee, including the Lord Chancellor (Lord Cottenham), after considering whether the last-mentioned peerage was extinct, held that it was; and, accordingly, on a subsequent day, resolved that the petitioner had made out his claim.³

¹ See The Fermoy Peerage Claim, 5 House of Lords Cases, at p. 724.

² See The Bloomfield Peerage, 2 Dow & Clark, 344.

³ See the Lords' Journals for 1836.

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ACCOUNT. See EQUITY, 1.

Under mortgages, how to be taken. See MORTGAGE.

Innes, consignee of a West India estate, was appointed trustee thereof by B., the tenant for life, for the purpose of keeping down encumbrances. Innes was also private agent and banker for B., with the understanding that B. was not, nor were his funds, to be liable for advances made by Innes for the estate; Innes, becoming embarrassed, was declared bankrupt, and assignees were appointed: *Held*, by the Lords, — reversing orders of the Court of Chancery, on a bill filed by B. and the other owners of the estate, to remove Innes from the possession and management, — that a sum found due from Innes to B., on their private dealings, might be set off against a sum found due to Innes in respect of his advances and payments for the estate. — *Baillie v. Edwards*, 74.

AGENT. See PRINCIPAL AND AGENT.

The law agent of a joint stock company is not its agent to bind it by representations as to its condition and circumstances; nor, though a shareholder in it, can he bind it as a partner, for a joint stock company is not, like an ordinary partnership, bound by the act of an individual member. — *Burnes v. Pennell*, 497.

AGREEMENT.

1. A memorandum which is not a complete agreement is not binding within the Statute of Frauds; and of an incomplete agreement there cannot be part performance. — *Thynne (Lady E.) v. Glengall (Earl)*, 181.
2. A father having agreed to settle a certain sum for the *benefit of *914 his daughter and the children of her intended marriage with Lord G., a memorandum of the terms of the settlement was by his direction written by his solicitor, and approved of by him and Lord G., and he gave the solicitor instruction to prepare such settlement, but died before the same was ready for execution, having by his will given the daughter real estates and a moiety of the residue of his personal estate. Lord G. married the daughter, and performed his part of the settlement, in conformity to the written memorandum. *Held*, that the memorandum was not a complete agreement, binding within the Statute of Frauds. — *Thynne (Lady E.) v. Glengall (Earl)*, 181.
3. A. entered into an agreement with B. and C. to serve them for seven years at fixed wages, at the rate of three guineas weekly, "the party

making default to pay to the other the sum of 500*l.* by way or in nature of specific damages." A. was dismissed; he became bankrupt, and after the bankruptcy brought an action of assumpsit on the agreement, to which the defendants pleaded his bankruptcy: *Held*, that this plea was an answer to the action, for that the right of action in respect of this breach of the agreement passed to his assignees. — *Beckham v. Drake*, 579.

APPEAL.

1. The circumstance that a person has been made a party to a suit in the Court below, if improperly so made, will not entitle him to appeal to this House against a decree made in that suit. — *Rochfort v. Battersby*, 388.
2. An objection to the competency of an appeal ought to have been presented to the Appeal Committee, but was not noticed till the case came on for hearing at the bar of the House: the objection was in its nature fatal. The House therefore dismissed the appeal, but, because the objection had not been taken till so late a period, dismissed the appeal with costs. — *Id. ib.*

APPENDIXES. See PRACTICE.

ASSIGNEES. See BANKRUPT.

ATTAINDER.

On the death of a peer, leaving his eldest son and heir, who had been attainted, the peerage does not vest in him, nor, on his death, the nearest
 * 915 heir male, but * is forfeited, as much as if he had been a peer at the time of his attainder. — *Perth Peerage*, 865.

A peerage limited to a man and his heirs male whomsoever, is forfeitable under the Act 26 Hen. VIII. c. 13. — *Id. ib.* See also *The Southwest Peerage*, 908.

BANKER.

The relation between a banker and customer, who pays money into the bank, is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the drafts of customers, and that relation is not altered by an agreement by the banker to allow the interest on the balances in the bank. The relation of banker and customer does not partake of a fiduciary character, nor bear analogy to the relation between Principal and Factor or Agent, who is *quasi* trustee for the principal in respect of the particular matter for which he is appointed factor or agent: *Held*, therefore, that an account between bankers and their customer, not long nor complicated, but consisting of a few items and interest, is not a fit subject for a bill in equity. — *Foley v. Hill*, 28.

BANKRUPT. See EVIDENCE, 4.

A. entered into an agreement with B. and C. to serve them for seven years, at fixed wages, at the rate of three guineas weekly, "the party making default to pay to the other the sum of 500*l.* by way or in nature of specific damages." A. was dismissed; he became bankrupt, and after the bankruptcy brought an action of assumpsit on the agreement, to which the defendants pleaded his bankruptcy. *Held*, that this plea was an answer to the action, for that the right of action in respect of this breach of the agreement passed to his assignees. — *Beckham v. Drake*, 579.

BAPTISM. See EVIDENCE.

BASE FEE. See ESTATE.

BIRTH. See EVIDENCE, 1.

BOTTOMRY. See INSURANCE.

CAPTION. See PLEADING, 3.

CHAPLAIN OF BRITISH EMBASSY. See EVIDENCE, 1.

CHARITIES.

By the Act 7 & 8 Vict. c. 97, the power of the Commissioners of Charitable Donations and Bequests for *Ireland to sue for the recovery of * 916 such donations and bequests, is expressly limited to cases where they are withheld, concealed, or misapplied; and the same, when recovered by the Commissioners, are to be, by themselves, applied to charitable uses, according to the donor's intention. And, although they obtain the sanction of the Attorney-General to their suit, as required by the said Act, they must maintain it according to the power of suing thereby given to them, and are not entitled to the general jurisdiction which the Court exercises in suits instituted by the Attorney-General. A decree, therefore, made at the suit of the Commissioners, first, removing a testamentary trustee of a charity, on the grounds of his bankruptcy and residence abroad, but without proof of any improper withholding, or concealment, or misapplication of the trust property; and, secondly, directing the appointment of another trustee in his place, is wholly wrong. *Semble*, that neither bankruptcy, nor occasional residence abroad, disqualifies a testamentary trustee, to whom the testator has, unconditionally, confided a large personal discretion in the administration of the trusts, together with power to appoint a receiver of the rents of the trust estates. *Archbold v. The Commissioners of Charitable Bequests for Ireland*, 440.

CONSPIRACY.

If the Directors of a Company agree to publish false statements of the affairs of the Company, under such circumstances as show a fraudulent intent to deceive, they are not only civilly liable to those whom they have deceived and injured, but may be criminally prosecuted, and punished for conspiracy. — *Burnes v. Pennell*, 497.

CORPORATION.

Where certain acts of a Corporation are to be performed at a special meeting of the members of that Corporation, all the persons entitled to be present thereat must be summoned, if they are within a reasonable summoning distance. The omission to summon any *one renders the acts done * 917 at such meeting in his absence invalid. A finding in a special verdict that a person entitled to be present at a special meeting of a corporate body was not summoned, and that he was at the time within summoning distance, throws on the party supporting the validity of the acts done at such meeting the *onus* of showing a sufficient cause for his not being summoned. The election of treasurer for the county of the city of Dublin was vested by the 49 Geo. III. c. 20, in "the board of magistrates of the county of the said city," and was directed to take place at the Sessions Court of the city, by vote of the magistrates there present: *Held*, that the Recorder of Dublin was a member of that board, and ought to have

been summoned to a meeting of the magistrates summoned for that election, and that the omission to summon him rendered the election which took place in his absence invalid. — *Smyth v. Darley*, 789.

COSTS.

1. The House will not grant the costs of an appeal to come out of the estate, upon a mere miscarriage of the Court below, where the subject of litigation, though in the result decided by the Court, was one which might have been required to be tried as a question of fact. — *Piers v. Piers*, 331.
 2. An objection to the competency of an appeal ought to have been presented to the Appeal Committee, but was not noticed till the case came on for hearing at the bar of this House: the objection was in its nature fatal. The House therefore dismissed the appeal, but, because the objection had not been taken till so late a period, dismissed it without costs. — *Rockfort v. Battersby*, 388.
 3. The Officers of State in Scotland obtained a judgment on interdict against an individual, who had, by erecting a wall, encroached on the seashore, the suit being instituted by them solely to protect the public right.
- * 918 The judgment of the Court below was appealed * against and affirmed, and was affirmed but without costs. — *Smith v. The Earl of Stair, and the Officers of State in Scotland*, 807.

COUNTY OF CITY. See CORPORATION.

DAMAGES, SPECIFIC. See AGREEMENT, 3.

DECREE.

Two actions were brought in Scotland, both arising out of the same cause. They were conjoined. The Lord Ordinary pronounced a judgment, which, in point of form, applied to one only, but which, in substance, affected both. His judgment was appealed against to the Court of Session, which made a decree, disposing, in form as well as substance, of both actions: *Held*, that a decree, so made, was correct. — *Burnes v. Pennell*, 497.

DEBT. See SATISFACTION.

DEEDS — CONSTRUCTION OF. See LIMITATIONS.

DELIVERY ORDER. See SALE OF GOODS.

The giving of a delivery order does not, without some positive act done under it, operate as a constructive delivery of the goods to which it relates, nor deprive the owner of the goods, who gave it, of his right of lien for their price, even as against the claims of a third person who has *bonâ fide* purchased them from the original vendee. S., the owner of sugars, sold them to B., to whom he gave a delivery order addressed to his agent A., and took a bill of exchange in payment of the price. B. sold the sugars to M., and transferred to him the delivery order. The sugars were in the warehouse of L., in whose books they were entered as received by him "from A., on account of S." The sugars were weighed and invoiced by A. upon the order of S. Neither B. nor M. took any steps to act on the delivery order, till a rumour arose of B.'s insolvency, when M. presented the order to A., and received from him a fresh order, addressed to L., the warehouse keeper. Before the sugars

could be actually delivered under this order, A. removed them, under the direction of S. *Held*, affirming the judgment of *the Court * 919 below, that the possession of the goods had never been changed, and that S. might still enforce upon them his lien as vendor. — *M'Ewan v. Smith*, 309.

DIRECTORS. See **JOINT STOCK COMPANY.**

DIVORCE. See **MARRIAGE.**

DRAINING ACT. See **HOLDERNESS DRAINING ACT.**

DUBLIN. See **CORPORATION.**

"ELDEST SON."

A testatrix gave to the eldest son of her daughter Eliza and of her husband E. L., who should be living at the time of her own decease, ten guineas, adding that she left him no larger sum, because he would have a handsome provision from the estates of her late husband and of his own father (who was still alive); and she gave the residue of her property to her executors, upon trust, as to one moiety thereof, to pay and divide the same unto and amongst all the children of her daughter Eliza, who were then in being or should be thereafter born, — except her eldest son, or such of her sons as should, by the death of an elder brother, become an eldest son, — equally to be divided amongst them, and the survivors or survivor, when the youngest should arrive at the age of twenty-one years. At the death of the testatrix, her daughter Eliza had five children, and the eldest son was provided for from the estates in the will mentioned, and he received the ten guineas, but died, without issue, before the youngest child attained twenty-one. The second, who then became an eldest son, did not succeed to the provision which had been made for the eldest son. *Held*, notwithstanding, that he, being the eldest son at the time the youngest of the children attained twenty-one, was excluded from any share in the moiety of the residue. — *Livesey v. Livesey*, 419.

EMBASSY, BRITISH. See **EVIDENCE**, 1.

ENTRY. See **ESTATE.**

EQUITY. See **ACCOUNT.** **FRAUD.** **SALE.**

The relation between a Banker and Customer, who pays *money into * 920 the Bank, is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the customer's drafts; and that relation is not altered by an agreement by the banker to allow the interest on the balances in the Bank. The relation of Banker and Customer does not partake of a fiduciary character, nor bear analogy to the relation between Principal and Factor or agent, who is *quasi* trustee for the principal in respect of the particular matter for which he is appointed factor or agent. *Held*, therefore, that an account between Bankers and their customer, not long nor complicated, but consisting of a few items and interest, is not exclusively a subject for a bill in equity. — *Foley v. Hill*, 28.

By the Act 7 & 8 Vict. c. 97, the power of the Commissioners of Charitable Donations and Bequests for Ireland, to sue for the recovery of such donations and bequests, is expressly limited to cases where they are withheld, concealed, or misapplied; and the same, when recovered by the commis-

sioners, are to be, by themselves, applied to charitable uses, according to the donor's intention. And although they obtain the sanction of the Attorney-General to their suit, as required by the said Act, they must maintain it according to the power of suing thereby given to them; and are not entitled to the general jurisdiction which the Court exercises in suits instituted by the Attorney-General. A decree, therefore, made at the suit of the Commissioners, first, removing a testamentary trustee of a charity, on the ground of his bankruptcy and residence abroad, but without proof of any improper withholding or concealment, or misapplication of the trust property; and secondly, directing the appointment of another trustee in his place, is wholly wrong. *Seem*, that neither bankruptcy nor occasional residence abroad disqualifies a testamentary trustee to whom the testator has unconditionally confided a large personal discretion

* 921 in the administration of the * trusts, together with power to appoint a receiver of the rents of the trust estates. — *Archbold v. Commissioners of Charitable Donations and Bequests for Ireland*, 440.

ERROR.

Where it appeared to the House that a mistake, committed by an officer of the Court below, in entering the judgment of that Court, was made the ground of a writ of error, the arguments on the writ of error brought on such judgment were stopped, and the case was ordered to stand over, to allow the parties to apply to the Court below to amend the error. The House made this order, after referring to the opinions of the Judges of the Court below, as stated in the printed reports of the decisions of that Court. — *Gregory v. Duke of Brunswick*, 415.

ESTATE.

An estate being limited to the use of A. and his wife, and the heirs of their bodies, with remainder to A. in fee, and A. having died, leaving his widow, and G., an only son, and L. and H., only daughters; the widow, in 1785, by deed poll, in consideration of an annuity granted to her by her son G. and of natural affection, "granted, surrendered, and yielded up" the estate to him in fee; and he afterwards, during her life, suffered a recovery. She died in 1767. G. died, without issue, in 1779, having devised the estate to trustees, to secure an annuity to B., the only son of his sister L. (then dead), and, subject thereto, to W., eldest son of B., for his life, with remainder to B.'s second son. In 1790, W., on his father's death, entered into possession of the whole estate, claiming under the will of G., and subsequently did various acts in the character of devisee for life: in 1814 he suffered a recovery of one moiety of the estate, and in 1810 conveyed the entirety thereof to mortgagees in fee. In 1818, M., the descendant of H., the other coparcener, suffered a recovery of the other moiety, which, it was declared, should enure *

* 922 (subject to the trusts of a term) to the use of W.'s mortgagees: *Held* (by the Lords — affirming a judgment of the Court of Exchequer Chamber), first, that the deed poll of 1785 operated as a covenant to stand seised, and created a base fee, determinable by the entry of the issue in tail; Secondly, That this base fee did not, on the widow's death, become merged in the reversion in fee in G., as the estate tail subsisted as an intermediate estate; Thirdly, that

although G., being estopped by the recovery suffered by him, was not remitted to the estate tail, no right of entry accrued to any one until his death, and therefore the period of twenty years, for the operation of the Statute of Limitations against the issue in tail, was to be calculated from his death (1779), and not from the death of his mother (1767), and that W.'s entry (in 1790) was not barred by lapse of time; Fourthly, that although W. entered under the will, and manifested an intention to take the estate under it for his life only, that was immaterial, and he was remitted, as to his moiety, to the original estate tail, which was barred by the recovery in 1818, and fifthly, that the entry and remitter of W. did not operate to remit his coparcener to the other moiety of the estate. — *Doe d. Daniel v. Woodroffe*, 811.

ESTOPPEL. See ESTATE.

EVIDENCE.

1. A copy of an entry, made from a certificate of baptism by a chaplain of a British minister at a foreign court, is not sufficient evidence of birth and parentage. — *Lord Dufferin and Claneboye's Claim*, 47.
2. Where a paper purports to be a receipt, and, as such, requires a stamp, but also purports to be an agreed statement of accounts, which does not require a stamp, it may be given in evidence to show the agreed state of accounts only, though it has not been previously stamped. Its admissibility under such circumstances is restricted to this extent: so far as it relates simply to proving the statement of account, and is not *pro- * 923 duced for the purpose of proving the receipt of money. It cannot be used for the purpose of proving the receipt of money in any way. If a document which is unstamped, but requires a stamp, is offered in evidence, and if stamped, would be evidence to establish any point litigated between the parties, it cannot be received. If it would be of no benefit when stamped, it may, though unstamped, be received in evidence. In an action for work and labour, there was tendered in evidence a paper containing a statement of accounts, which declared a balance of 68*l.* 9*s.* 4*d.*, and at the end was an acknowledgment of the payment of that sum. In an action for work and labour this paper was offered in evidence by the defendant, not for the purpose of proving that the sum of 68*l.* 9*s.* 4*d.* had been paid, for that was not in contest between the parties, but in order to show what was the admitted state of accounts at a particular time: *Held* (reversing an interlocutor of the Court of Session), that it was admissible for that purpose. — *Matheson v. Ross*, 286.
3. The question of the validity of a marriage cannot be tried like any other question of fact which is independent of presumption, for the law will presume in favour of marriage. There is a strong legal presumption in favour of marriage, particularly after the lapse of a great length of time, and this presumption must be met by strong, distinct, and satisfactory disproof. Where, therefore, two persons had shown a distinct intention to marry, and a marriage had been, in form, celebrated between them, by a regularly ordained clergyman, in a private house, as if by special license, and the parties, by their acts at the time, showed that they believed such marriage to be a real and valid marriage, the rule of presumption was

- applied in favour of its validity, though no license could be found, nor any entry of the granting of it, or of the marriage itself, could be discovered; and though the Bishop of the diocese (during whose episcopacy the matter
- * 924 occurred), when * examined many years afterwards on the subject, deposed to his belief that he had never granted any license for such marriage. — *Piers v. Piers*, 381.
4. Where the fact of bankruptcy is not put in issue by the bill, evidence of it is not admissible at the hearing of the cause. — *Archbold v. The Commissioners of Charitable Bequests for Ireland*, 440.
 5. Ancient documents of a public character, brought from the proper repository, are, in the absence of patents or Parliamentary records, admissible as evidence of the creation and existence of Peerages: And *semble*, that, by the law of Scotland, contemporaneous history is admissible for the same purpose. — *Crawford and Lindsay Peerage*, 534.
 6. A witness brought to prove a copy of an old document should be able to read and understand the original when he compared the copy with it. — *Id. ib.*
 7. The terms "Protestant Dissenters," not having acquired a known legal meaning at a particular time, evidence may be received to show what was their meaning in a deed of that time, such as contemporaneous documents and usage, the acts of the party making the deed, and the circumstances in which he was when he made it, but not his particular opinions or declarations. — *Drummond v. Attorney-General of Ireland*, 837.
 8. Attested copies of French registers of marriages, births, and deaths, held to be admissible evidence, upon the testimony of a French Advocate that such registers were kept according to French law, and would be received in evidence in the French Courts. — *Perth Peerage*, 865.

See the same case, for other points, in the law of EVIDENCE.

EXECUTORS. See TRUSTS.

FOREIGN SOVEREIGN. See JURISDICTION.

FRAUD.

1. After a long lapse of time since the transactions complained of, there having been parties *in esse* competent to impeach them, fraud is not to be assumed on doubtful evidence; but if it be clearly proved, no lapse of
- * 925 time will protect the parties to it, or those * who claim through them, against the jurisdiction of a Court of Equity, and in that case it is immaterial by what machinery or contrivance the fraudulent transactions may have been effected, whether by a decree in equity, or judgment at law, or otherwise. — *Bowen v. Evans*, 257.
2. By the deed of co-partnership of a joint stock company, certain forms were to be observed by any transferee of shares, before he could become a member of the company. A. purchased shares, and executed some of the acts required to constitute him a member of the company; but left one of these acts unexecuted: Held, that the execution of these acts was a duty cast on the purchaser for the benefit of the company, and that his non-execution of one of them did not enable him, as respected the company, to retire from his contract. A Joint Stock Marine Insurance Company had declared dividends, which, it afterwards appeared, were not

warranted by the real condition of the company. The law agent of the company, who was also a member of it, when applied to for information, mentioned these dividends as proofs of the flourishing state of the company. The person to whom he so mentioned them became afterwards a purchaser of shares: *Held*, that he could not relieve himself from his contract on account of these representations. *Held*, also, that the law agent of the company was not its agent to bind it in such matters; nor could he bind it as a partner, for a joint stock company is not, like an ordinary partnership, bound by the acts of any individual member of it. If the directors of a company agree to publish false statements of the affairs of the company, under such circumstances as show a fraudulent intent to deceive, they are not only civilly liable to those whom they have deceived and injured, but may be criminally prosecuted, and punished for conspiracy. — *Burnes v. Pennell*, 497.

FRAUDS, STATUTE OF. See AGREEMENT.

A memorandum which is not a complete agreement is not binding within the Statute of Frauds: and of an incomplete agreement there cannot be part performance. — *Thynne (Lady E.) v. Glengall (Earl)*, 131.

* FREIGHT. See INSURANCE.

* 926

1. In all cases of insurance on ship, in which the subject is not actually annihilated, the assured claiming as for a total loss must give up to the underwriters all the remains of the property recovered, together with all benefit or advantage incident to it, or rather, such property vests in the underwriters. Freight, while the ship is in the course of earning it, is a benefit or advantage incident to the ship, and, therefore, becomes the property of the underwriters, paying for a total loss. A vessel, in the course of a voyage, struck upon an iceberg on the 27th of July, and was considerably injured, but reached Liverpool, and while in the river there, grounded outside the docks on the 11th of August, was afterwards taken into dock, the cargo discharged, and was then surveyed, and, after the survey, namely, on the 1st of September, the owner abandoned to the underwriters on ship, and claimed as for a total loss: *Held*, that the underwriter on ship was entitled, on settling as for a total loss, to have the benefit, in account, of the freight which had been received by the owner on the discharge of the cargo. — *Stewart v. The Greenock Marine Insurance Company*, 159.

2. A partial loss of freight may be recovered on a declaration claiming a total loss. — *Benson v. Chapman*, 696.

HOLDERNESS DRAINING ACT.

There is no rule of law which prohibits a retrospective rate. In every case of rating the question is, whether the Act under which a rate is made, either expressly or impliedly, prohibits such rate from being retrospective. The 2 Wm. IV. c. 50 (public local) for draining the lands of Holderness, in the East Riding of the county of York, contains no prohibition against a retrospective rate. The commissioner under that Act borrowed money (on which interest became due), for the purposes of the works directed by the Act: *Held*, that a rate made to pay off the debt thus incurred was, under the provisions of that Act, a valid rate. — *Harrison v. Stickney*, 108.

* 927 *INDICTMENT. See TREASON. PLEADING, 3, 4. PRACTICE, 5.

Semble, that an indictment will lie against the directors of a company who have wilfully published false statements of the affairs of their company, under such circumstances as show a fraudulent intent to deceive. — *Burnes v. Pennell*, 497.

INSOLVENT. See PLEADING. SALE. GOODS. AGREEMENT. BANKRUPT.

An insolvent debtor has not such an interest in property assigned under the Insolvent Acts, as to entitle him to enter into any litigation respecting it. — *Rochfort v. Battersby*, 388.

INSURANCE.

1. In all cases of insurance on ship, in which the subject is not actually annihilated, the assured claiming as for a total loss must give up to the underwriters all the remains of the property recovered, together with all the benefit or advantage incident to it, or rather, such property vests in the underwriters. — *Stewart v. The Greenock Insurance Company*, 159.
2. Freight, while the ship is in the course of earning it, is a benefit or advantage incident to the ship, and therefore becomes the property of the underwriters, paying for a total loss. — *Id. ib.*
3. A vessel, in the course of a voyage, struck upon an iceberg on the 27th of July, and was considerably injured, but reached Liverpool, and while in the river there, grounded outside the docks on the 11th of August, was afterwards taken into dock, the cargo discharged, and was then surveyed, and after the survey, namely, on the first of September, the owner abandoned to the underwriters on ship, and claimed as for a total loss. — *Id. ib.*
4. *Held*, that the underwriter on ship was entitled, on settling as for a total loss, to have the benefit, in account, of the freight which had been received by the owner on the discharge of the cargo. — *Id. ib.*
- * 928 * 5. It is the duty of a master, in case of damage to the ship, to do all that can be reasonably done to repair the ship, bring home the cargo, and earn the freight. — *Benson v. Chapman*, 696.
6. Where, in case of damage to a ship, the master elects to repair it, the mere fact that the expense of repair ultimately proves to be greater than the value of the ship, will not be sufficient to show that he acted beyond the scope of his authority, or to entitle the owner in an action on a policy on freight, to recover as for a total loss. — *Id. ib.*
7. The receipt of freight by the obligee of a bottomry bond is, in law, a receipt of it by the shipowner, whose master has given that bond in discharge of expenses incurred in the necessary repairs of the ship. — *Id. ib.*
8. The owner of a ship insured ship and freight. On leaving Pernambuco in June, 1839, the ship struck on a rock, and put back. After a survey, repairs were begun. They were continued for a long period, and the expense of them much exceeded the value of the ship and freight. The master, not being able to procure money in any other manner, was compelled to borrow on a bottomry bond, charging ship, freight, and cargo. On the 30th of December, 1839, the owner in London, on being shown a letter addressed to the agents of the lenders on bottomry, in which the

great expenses of the repairs were stated, gave notice of abandonment to the underwriters on ship and on freight. The ship arrived, and the freight was duly paid to the holders of the bottomry bond, under an order of the Court of Admiralty. The shipowner sued the underwriters on freight as for a total loss. The jury found, on a special verdict, that the plaintiff had acted *bonâ fide* without laches, and as a prudent owner of ship and freight, if uninsured, would act: *Held*, that in this case, which was one of constructive total loss, the master might have abandoned at Pernambuco, but that having there elected to repair, he must be treated for that purpose as the agent * of the owner, * 929 whose acts bound the owner: *Held*, also, that as the special verdict did not find that the owner, if on the spot, would not have repaired the ship, the Court could not infer that he would not have done so. — *Benson v. Chapman*, 696.

IRELAND. See CORPORATION. TREASON.

JOINT STOCK COMPANY. See WINDING-UP ACTS.

By the deed of copartnership of a joint stock company, certain forms were to be observed by any transferee of shares, before he could become a member of the company. A. purchased shares, and executed some of the acts required to constitute him a member of the company; but left one of these acts unexecuted: *Held*, that the execution of these acts was a duty cast on the purchaser for the benefit of the company, and that his non-execution of one of them did not enable him, as respected the company, to retire from his contract. A Joint Stock Marine Insurance Company had declared dividends, which, as it afterwards appeared, were not warranted by the real condition of the company. The law agent of the company, who was also a member of it, when applied to for information, mentioned these dividends as proofs of the flourishing state of the company. The person to whom he so mentioned them became afterwards a purchaser of shares: *Held*, that he could not relieve himself from his contract on account of these representations: *Held*, also, that the law agent of the company was not its agent to bind it in such matters; nor could he bind it as a partner, for a joint stock company is not, like an ordinary partnership, bound by the acts of any individual member of it. If the directors of a company agree to publish false statements of the affairs of the company, under such circumstances as show a fraudulent intent to deceive, they are not only civilly liable to those whom they have deceived and injured, but may be criminally prosecuted, and punished for conspiracy. — *Burnes v. Pennell*, 497.

* JURISDICTION. See EQUITY.

* 930

A foreign sovereign, who is also a British subject, coming to England, cannot be made responsible in the Courts here for acts done by him, in his sovereign character, in his own country: *Held*, therefore, that the King of Hanover, who was also a British subject, and was in England exercising his rights as such subject, could not be made to account in the Court of Chancery for acts of state done by him in Hanover and elsewhere abroad, in virtue of his authority as a sovereign, and not as a British subject. — *Duke of Brunswick v. The King of Hanover*, 1.

LEGACY.

When satisfaction of a debt, or of a portion. See SATISFACTION.

LIEN. See FRAUD.

The giving of a delivery order does not, without some positive act done under it, operate as a constructive delivery of the goods to which it relates, nor deprive the owner of the goods, who gave it, of his right of *lien* for their price, even as against the claim of a third person, who has *bonâ fide* purchased them from the original vendee. S., the owner of sugars, sold them to B., to whom he gave a delivery order addressed to his agent A., and took a bill of exchange in payment of the price. B. sold the sugars to M., and transferred to him the delivery order. The sugars were in the warehouse of L., in whose books they were entered as received by him "from A. on account of S." The sugars were weighed and invoiced by A. upon the order of S. Neither B. nor M. took any steps to act on the delivery order till a rumour arose of B.'s insolvency, when M. presented the order to A., and received from him a fresh order, addressed to L., the warehouse keeper. Before the sugars could be actually delivered under this order, A. removed them, under the direction of S: *Held*, affirming the judgment of the Court below, that the possession of the goods had never been changed, and that S. might still enforce upon them his lien as vendor. — *M'Ewan v. Smith*, 309.

* 931 * LIMITATIONS, IN DEEDS AND SETTLEMENTS. See PRERAGE.

1. Lands, held in fee simple, were, by settlement made in 1752, conveyed to trustees, to the use of the settlor for life; remainder to the use of his three daughters for their lives, as tenants in common; remainder to the use of trustees to preserve; remainder, as to the share of each daughter, to the use of her first and other sons successively in tail male; remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivors or survivor, during their or her respective lives or life, as tenants in common; in case of two survivors, with remainder, in like manner as to the original share, to the use of the first and other sons of such surviving daughters or daughter in tail male; remainder, in case all the daughters should die without issue male, as to the share of each, to the use of their daughters as tenants in common in tail; and in case one or two of the settlor's daughters should die without issue, the share or shares of such daughter or daughters, to go to the use of the daughters of the survivors or survivor, as tenants in common in tail general; and in case all three should die without issue, then remainder over, with ultimate remainder to the use of the settlor in fee. He died soon after without disposing of the reversion: *Held*, that the limitation, in case of the failure of issue, generally, of any of the daughters, to the daughters of the survivors or survivor, was a good contingent remainder, and therefore not void for remoteness: And also, that the words "survivors or survivor" were to be read "others or other," and, consequently, the limitation over to the daughters of one of the settlor's daughters, who had issue, was not defeated by the death of that daughter in the lifetime of another, who subsequently died without issue, but that limitation took effect as a good cross remainder. — *Cole v. Sewell*, 186.

- * 3. One only of the settlor's daughters had issue, four daughters and * 932 no son; L. E. S., one of the four, in 1779, while her sisters, mother, and aunts were living, executed a post-nuptial settlement, which recited the said deed of 1752—and another of 1749, under which she was entitled to a vested estate tail in lands called the B. estate, on the death of her father—and that she was entitled in remainder or reversion, expectant and to take effect in possession on the determination of certain prior estates, to several parts of lands in the deed of 1752 mentioned. It also recited a post-nuptial settlement of 1776, in which were recited L. E. S.'s title to certain shares in remainder or reversion expectant, &c., and her desire to limit and assure the same, and that it was thereby witnessed that in order to bar the estates in remainder or reversion, expectant and to take effect in possession as aforesaid, then vested in her, but without prejudice to the prior estates, she and her husband covenanted to levy fines of her said undivided shares in remainder, to enure to these uses, namely, that the trustees should, out of the hereditaments comprised in the deeds of 1749 and 1752, first falling into possession, take an annuity of 300*l.*, and out of those next falling into possession, a similar annuity, both being for L. E. S.'s separate use, and, subject thereto, to the use of her husband for life, remainder to herself in fee. It further recited that no fines were levied under the deed of 1776, and that L. E. S. was desirous of securing payment of certain debts, and, subject thereto, of settling the said remainders and reversions expectant and to take effect as aforesaid, for the benefit of her two children, and had agreed to settle the same, and all her right and interest in the premises, to the uses thereafter mentioned; and it was, by the deed of 1779, witnessed that, in order to bar the estate tail in remainder or reversion expectant upon and to take effect as aforesaid, then vested in L. E. S. in the hereditaments comprised * in the deeds of 1749 and 1752, without preju- * 933 dice to the prior estates, the said L. E. S. and her husband covenanted to levy fines of all her undivided shares in remainder or reversion expectant, and to take effect as aforesaid in the said hereditaments, to enure to trustees for 1000 years, to raise the amount of the aforesaid debts; remainder to other trustees for 1500 years, to raise 5000*l.* for L. E. S.; remainder to other trustees for 2000 years to raise an annuity of 100*l.* out of the lands first falling into possession, and a similar annuity out of those next falling into possession for maintenance of her only son; remainder to trustees for 3000 years, to raise 3000*l.* for her only daughter; remainder to the use of the son and his issue, in strict settlement; remainder to the use of the daughter and her daughters in tail: *Held*, that all the estates and interests, contingent as well as vested, in the lands to which L. E. S. was entitled under the limitations of the deed of 1752, passed and were bound by the deed of 1779, and the fines that were levied in pursuance thereof. — *Cole v. Sewell*, 186.
3. The settlor's three daughters died,—one in 1784, *s. p.*, another, the mother of L. E. S., in 1793, the third, in 1799, *s. p.*, all intestate and without having disposed of the reversion vested in them by descent. One of L. E. S.'s sisters died in 1788, intestate and without issue. In 1809

- one third of the lands comprised in the deed of 1752 was, on partition, allotted to L. E. S., and by a decree for sale made in 1820, in a suit instituted against her by the trustees of the term of 1000 years comprised in the deed of 1799, it was declared that the whole of the one third so allotted was subject to the trusts of the term, and bound by that deed, and the fines levied in pursuance thereof. By a deed executed in 1825, it was witnessed that for barring all estates tail therein mentioned, and settling
- * 934 the lands therein comprised, L. E. S. and her husband and a * trustee of the deed of 1779, conveyed all the said one-third part, so allotted in severalty to L. E. S. as aforesaid, and also her undivided third part of the B. estate (which had then by the death of her father come into possession) to a trustee, that recoveries might be suffered of the said lands, and it was covenanted that they should enure, as to such of the said undivided parts as were comprised in the deed of 1779, to the uses therein mentioned, and in confirmation thereof and of the term of 1000 years; and — after reciting that three specified denominations of lands of which L. E. S. was stated to be seised in tail in remainder, at the date of the deed of 1779, were not comprised therein or in the fines levied in pursuance thereof, and reciting the said suit and decree for sale therein made, and that L. E. S. had agreed to make the said denominations subject to the said term — it was further agreed and declared that the said recoveries should enure to confirm the sale of the said three denominations for the said term, and to give validity to the said decree, and, subject to the said term, to such uses as L. E. S. should appoint, and, as to the lands comprised in the deed of 1779, to such further uses as had not been thereby declared concerning the same, as L. E. S. should by deed or will appoint: *Held*, that by this deed, and the recoveries suffered in pursuance thereof, the whole of the lands allotted in severalty to L. E. S. on the partition, except the said three denominations, were made subject to the uses of the deed of 1779. — *Cole v. Sewell*, 186.

LIMITATIONS, STATUTE OF.

- An estate being limited to the use of A. and his wife, and the heirs of their bodies, with remainder to A. in fee, and A. having died, leaving his widow and G., an only son, and L. and H., only daughters, the widow in 1735 by deed poll, in consideration of an annuity granted to her by G., and of natural affection, "granted, surrendered and yielded up" the estate to him in fee;
- * 935 and he * afterwards, during her life, suffered a recovery. She died in 1767. G. died in 1779, having devised the estate to trustees to secure an annuity to B., the only son of his sister L. (then dead), and subject thereto, to W., eldest son of B., for his life, with remainder to B.'s second son. In 1790 W., on his father's death, entered into possession of the whole estate, claiming under the will of G., and subsequently did various acts in the character of devisee for life. In 1814 he suffered a recovery of one moiety of the estate, and in 1816 conveyed the entirety thereof to mortgagees in fee. In 1818 M., the descendant of H., the other coparcener, suffered a recovery of the other moiety, which it was declared should enure (subject to the trusts of a term) to the use of W.'s mortgagees: *Held*, by the Lords,

affirming a judgment of the Court of Exchequer Chamber, That although G. being estopped by the recovery suffered by him was not remitted to the estate tail, no right of entry accrued until his death, and therefore the period of twenty years for the operation of the Statute of Limitations against the issue in tail was to be calculated from his death, and not from the death of his mother, and, consequently, that W.'s entry in 1790 was not barred by lapse of time; and that although W. entered under the will, and manifested an intention to take the estate under it for his life only, his doing so was immaterial, and he was remitted, as to his moiety, to the original estate tail, which was barred by the recovery in 1818. — *Doe d. Daniel v. Woodroffe*, 811.

MAGISTRATE. See CORPORATION.

MARINE INSURANCE. See INSURANCE.

MARRIAGE. See EVIDENCE.

1. A young lady, eighteen years of age, entitled to considerable property, her parents being dead, having been passing her vacation at the house of one of the executors named in her father's will, whom she considered as her guardian, was induced by his brother, who was residing *in the same *936 house, and was fifty-two years of age, to promise to marry him; she withdrew that promise a few days afterwards, but was importuned again, and prevailed upon to renew it, and the marriage was celebrated without the knowledge of any of her friends, upon a false statement made by him of her age and residence in the publication of the banns and in the register of the marriage. There was no cohabitation, nor consummation of the marriage, as she alleged. She, after a few days, went to a friend's house, and by his advice applied for an Act to annul the marriage, the same being considered valid in law. *Held*, that it did not appear by the evidence, that the marriage was not solemnized with the free consent of the lady, and that the case made was not such as to justify legislative interference. — *Field's Marriage Annuling Bill*, p. 48.

See also *Wortham's Case*, 73 note.

2. The question of the validity of a marriage cannot be tried, like any other question of fact which is independent of presumption, for the law will presume in favour of marriage. There is a strong legal presumption in favour of marriage, particularly after the lapse of a great length of time, and this presumption must be met by strong, distinct, and satisfactory disproof. Where, therefore, two persons had shown a distinct intention to marry, and a marriage had been, in form, celebrated between them, by a regularly ordained clergyman, in a private house, as if by special license, and the parties, by their acts at the time, showed that they believed such marriage to be a real and valid marriage, the rule of presumption was applied in favour of its validity, though no license could be found, nor any entry of the granting of it, or of the marriage itself, could be discovered; and though the Bishop of the diocese (during whose episcopacy the matter occurred), when examined many years afterwards on the subject, *deposed to his belief that he had never granted any license for such *937 marriage. — *Piers v. Piers*, 331.

MARRIAGE SETTLEMENT. See AGREEMENT. POWER OF APPOINTMENT.

1. A father having, upon the marriage of his daughter, agreed to give her a portion of 100,000*l.*, transferred one-third part thereof in stock to the four trustees of the marriage settlement, and gave them his bond for transfer of the remainder in like stock upon his death, the latter stock to be held by them in trust for the daughter's separate use for life, and after her death for the children of the marriage, as the husband and she should jointly appoint. The father afterwards by his will gave to two of the trustees a moiety of the residue of his personal estate, in trust for the daughter's separate use for life, remainder for her children generally as she should by deed or will appoint: *Held*, that the moiety of the residue given by the will was in satisfaction of the sum of stock secured by the bond, notwithstanding the difference of the trusts; and, it being found to be for the benefit of the daughter and her children, if any she should have, to take under the will, she was bound to elect so to take. — *Thynne (Lady E.) v. Glengall (Earl)*, 131.

MASTER. See **INSURANCE**, 5, 6, 7, 8.

MERGER. See **ESTATE**.

MORTGAGE. See **PLEADING**, 1.

- H. C. mortgaged the entirety of freehold, and part of copyhold hereditaments to secure payment of 6500*l.* M. C., who was the owner of two thirds of the freeholds, received two thirds of the 6500*l.*, and he and his wife joined in collateral securities for payment of the whole sum. H. C. afterwards paid 500*l.* of the mortgage debt, and, subject thereto, conveyed his one third of the freeholds to secure payment of 12,000*l.* M. C. subsequently mortgaged his two thirds of the freehold hereditaments to secure payment of 2106*l.* The first and last mortgages were assigned * 938 to G. B. T., who *filed his bill for redemption or foreclosure: *Held*, affirming the decree of the Vice-Chancellor of England, 1st. That G. B. T. was not entitled to tack the last mortgage to the first: 2d. That the accounts of the rents and profits of the mortgaged premises, possessed by G. B. T., should be taken against him, with annual rests, if they should be found to have exceeded the interest on the mortgages. The separate estate of M. C.'s wife was not affected by her joining in the securities. — *Thornycroft v. Crockett*, 239.

PARTNERSHIP CAPITAL. See **TRUSTS AND TRUSTEES**.

PEERAGE. See **ATTAINDER. EVIDENCE**, 5, 6, 8.

1. In a claim to an ancient Scotch Dignity, if no patent or other instrument of creation can be produced, it may be presumed that the Dignity was created by patent or charter, limiting it in the manner in which it has been actually enjoyed; and if that enjoyment be shown to have been confined to heirs male, in exclusion of nearer heirs female, the Dignity must be held to be a male Honour, always descendible to the heirs male of the body of the first grantee. An ancient Scotch Dignity might, before the Union, be conveyed by the possessor, together with the territory thereto annexed, to another branch of the family, or even to a stranger, with the King's authority; or it might be resigned to the King, to be

regranted by a new patent, with different destinations and with its old precedence. — *Crawford and Lindsay Peerage*, 534.

2. On a claim to a Scotch peerage, there being no patent, or charter of creation or enrolment thereof discovered, a copy of an enrolment of a commission under the Great Seal and King's sign manual, dated in February, 1605, directing the commissioners to create James Lord Drummond Earl of Perth, was received, and held, in conjunction with subsequent entries in the Parliament records, to be sufficient proof of the creation of the Earldom. — *Perth Peerage*, 865.
3. In the absence of the instrument of creation of a Scotch peerage, the limitations are taken from usage to be to the grantee and his heirs male general. — *Perth Peerage*, 865.
- * 4. A peerage limited to a man and his heirs male, is one entire * 939 estate, and no substitution of heirs takes place. — *Id. ib.*
5. Scotch Peerages, created by patents in 1616 and 1633 respectively, and limited to the grantee and his heirs male, descended through the line of his eldest son, and became in 1699, vested in the fifth Baron and Earl, who was attainted of high treason in 1715, and died in 1729, without leaving issue. His collateral heir, descended from a younger son of the first Peer, claimed the Dignities in 1848: *Held*, that the attainder was a bar. — *The Barony of Carnegie and Earldom of Southesk*, 908.
6. The Sovereign cannot hold a peerage: accordingly, where a member of the Royal Family, who was a Peer of Ireland, succeeded to the Crown, the Peerage became extinct. — *Lord Oranmore's Claim*, 910.

PLEADING. See EVIDENCE, 4.

1. W. R. was the owner in fee of certain estates in Ireland, which, on his marriage with E., he charged with an annuity by way of jointure. W. R. had issue a son, W. H. R., and died. For some years the annuity fell into arrear. The widow (under the terms of the settlement) entered into possession of the estates and received the rents. W. H. R. became insolvent, and the assignments, usual under an insolvency, were executed. W. H. R. afterwards mortgaged to B. his interest in the estates, without giving notice to the mortgagee of his previous insolvency. He gave, as further security, a bond and warrant of attorney, it being thereby provided that B., on redemption of the mortgage, should reconvey the lands, and sign satisfaction on any judgment which might be entered up on the warrant of attorney. The mortgage was duly registered, and therefore, under the Irish Acts, took priority over the assignments, which had not been registered. A bill for foreclosure or redemption was filed by B., the mortgagee, who made the jointress, the insolvent, and the assignees, parties thereto. The Court decreed the jointure to be the first charge on the estates, and * the mortgage to come next, and direct- * 940 ed accounts to be taken accordingly. The assignees did not appeal against this decree. The insolvent presented an appeal against it: *Held*, that he ought not to have been made a party to the suit, and therefore had no title to appeal against the decree. — *Rockfort v. Battersby*, 388.
2. If a bill alleges fraud, which is not proved, and also alleges other matters,

which, being proved, are grounds for a decree, the proper course is to dismiss so much of the bill as is not proved, and to give as much relief, under the circumstances, as the plaintiff may be entitled to. — *Archbold v. Commissioners of Bequests for Ireland*, 440.

3. An allegation upon a record that three Judges executed a commission in relation to the trials of prisoners, to try whom that commission was issued, is an affirmative allegation of their authority to perform that duty, and is not rendered uncertain by a subsequent statement that the commission was directed to them and others. — *O'Brien v. The Queen*, 465.
4. *Quære*, whether an objection for the want of a copy of an indictment for treason, and of a list of the Crown's witnesses, to which the prisoner is declared entitled by the statutes relating to treason in Ireland, is to be raised by plea on arraignment. — *Id. ib.*
5. An *allocutus*, whether "the justices and commissioners ought not on the premises and verdict aforesaid to proceed to judgment" against the prisoner, is sufficient. The form "judgment of death," or "judgment to die," is surplusage. — *Id. ib.*
6. Under a declaration for a total loss of freight, a partial loss of freight may be recovered. — *Benson v. Chapman*, 696.

POWER OF APPOINTMENT.

- R. P., being entitled to one-third share of real and personal estates, settled such share upon her marriage, with power of appointment to herself (in
- * 941 events that * happened) over one-third part thereof, by deed or will, and over the other two-third parts by will, subject to the husband's life interest therein, and in default of issue of the marriage. R. P. becoming entitled to a moiety of another third share of the same estates, settled it to such uses as she should appoint, subject to the husband's life interest. There was one child of the marriage. R. P. by her will devised, bequeathed, and appointed "all that one-third part of her real and personal estates, over which she had a disposing power," upon trust, immediately after her death to raise a sum of 500*l.*; and "as to the residue of the said one-third part, and the remaining two-third parts," she gave the same to her husband for life, remainder to her infant son, and his heirs; but in case he should die under twenty-one, without issue, she directed the residue of the said one-third part to be sold, for payment of an annuity and legacies given by her will, — the annuity to be payable upon the son's death, and the legacies as soon as the said one-third part could be sold; and as to the remaining two-third parts, subject to her husband's life interest, she gave and appointed them to her sister absolutely. The son survived the testatrix, and died under twenty-one without issue: *Held*, that the appointment of the "one-third part" for payment of the annuity and legacies, extended only to one ninth of R. P.'s original third share, and to one third of her moiety of the other third share. 2. That the annuity and legacies became payable on the death of the son, with interest on the legacies from that time. 3. That the will did not affect the husband's rights under the settlements, and no case of election was raised against him. — *Sauvart v. M'Donnell*, 88.

PRACTICE. See CHARITIES. ERROR.

1. The House will not grant the costs of an appeal to come out of the estate, upon a mere miscarriage of the Court below, where the subject of litigation, though in * the result decided by the Court, was one which * 942 might have required to be tried as a question of fact. — *Piers v. Piers*, 331.
2. The House strongly condemned the custom of each party printing an Appendix to his case, and desired that, in future, a joint Appendix might alone be printed. — *Id. ib.*
3. The circumstance that a person has been made a party to a suit in the Court below, if improperly so made, will not entitle him to appeal to this House against a decree made in that suit. — *Rochfort v. Battersby*, 388.
4. Where it appeared to the House that a mistake committed by an officer of the Court below in entering the judgment of that Court was made the ground of a writ of error, the arguments on the writ of error brought on such judgment were stopped, and the case was ordered to stand over, to allow the parties to apply to the Court below to amend the error. The House made this order, after referring to the report of the opinions of the Judges of the Court below, as stated in the printed reports of the decisions of that Court. — *Gregory v. The Duke of Brunswick*, 415.
5. If a bill alleges fraud, which is not proved, and also alleges other matters, which, being proved, are grounds for a decree, the proper course is to dismiss so much of the bill as is not proved, and to give so much relief under the circumstances as the plaintiff may be entitled to. — *Archbold v. Commissioners of Bequests for Ireland*, 440.
6. An *allocutus*, whether "the justices and commissioners ought not, on the premises and verdict aforesaid, to proceed to judgment" against the prisoner, is sufficient. The form "judgment of death," or "judgment to die," is surplusage. — *O'Brien v. The Queen*, 465.
7. Two actions were brought in Scotland, both arising out of the same cause. They were conjoined. The * Lord Ordinary pronounced a * 942 judgment, which, in point of form, applied to one only, but which, in substance, affected both. His judgment was appealed against to the Court of Session, which made a decree, disposing in form as well as substance, of both actions: *Held*, that a decree, so made, was correct. — *Burnes v. Pennell*, 497.
8. The officers of state in Scotland obtained a judgment on interdict against an individual who had, by erecting a wall, encroached on the sea-shore, the suit being instituted by them solely to protect the public right. The judgment of the Court below was appealed against and affirmed, but was affirmed without costs. — *Smith v. The Earl of Stair and the Officers of State in Scotland*, 807.
9. A decree which declares Trinitarian Protestant Dissenters alone to be entitled to a trust fund, is right in removing from the trust such of them as concurred in the misapplication of the fund, by allowing Unitarian Protestant Dissenters to administer it with them. — *Drummond v. The Attorney-General of Ireland*, 837.

PRESUMPTION. See EVIDENCE, 2.

PRINCIPAL AND AGENT. See **AGENT.**

The relation between a banker and a customer, who pays money into the bank, is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the customer's drafts; and that relation is not altered by an agreement by the banker to allow the interest on the balances in the bank. The relation of banker and customer does not partake of a fiduciary character, nor bear analogy to the relation between principal and factor or agent, who is quasi trustee for the principal in respect of the particular matter for which he is appointed factor or agent. *Held*, therefore, that an account between bankers and their customer, not long nor complicated, but consisting of a few * 944 items and interest, * is not a fit subject for a bill in equity. — *Foley v. Hill*, 28.

"PROTESTANT DISSENTERS." See **EVIDENCE**, 7.

In the year 1710, certain members of Protestant Dissenting congregations in Ireland subscribed sums of money for charitable purposes, and for the management of the fund executed a deed, which recited that the objects of the trusts thereof were — 1st, To support the Protestant Dissenting interest against unreasonable prosecutions: 2d, To educate youth designed for the ministry among Protestant Dissenters: 3d, To assist poor Protestant Dissenting congregations: and 4th, For such other pious and religious ends and by such means as the subscribers should think proper for promoting these objects: *Held*, affirming the judgment of the Court of Chancery in Ireland, that Unitarian Protestant Dissenters were not within the trusts of this deed. — *Drummond v. The Attorney-General*, 837.

PURCHASE. See **SALE.****RATE.**

There is no rule of law which prohibits a retrospective rate. In every case of rating the question is, whether the Act under which a rate is made, either expressly or impliedly, prohibits such rate from being retrospective. The 2 Wm. IV. c. 50 (public local) for draining the lands of Holderness, in the East Riding of the county of York, contains no prohibition against a retrospective rate. The commissioner under that Act borrowed money (on which interest became due), for the purposes of the works directed by the Act: *Held*, that a rate made to pay off the debt thus incurred was, under the provisions of that Act, a valid rate. — *Harrison v. Stickney*, 108.

RECEIPT. See **STAMP.****RECORDER.** See **CORPORATION.****REGISTERS.** See **EVIDENCE.****REMITTER.**

An estate being limited to the use of A. and his wife, and the heirs of their * 945 bodies, with remainder to A. in * fee, and A. having died, leaving his widow, and G. an only son, and L. and H. only daughters, the widow, in 1735, by deed poll, in consideration of an annuity granted to her by G., and of natural affection, "granted, surrendered, and yielded up" the estate to him in fee; and he afterwards, during her life, suffered a recovery. She died in 1767. G. died, without issue, in 1779, having devised the estate to trustees, to secure an annuity to B., the only son of his sister

L., (then dead), and subject thereto to W., eldest son of B., for his life, with remainder to B.'s second son. In 1790, W., on his father's death, entered into possession of the whole estate, claiming under the will of G., and subsequently did various acts in the character of devisee for life. In 1814 he suffered a recovery of one moiety of the estate, and in 1816 conveyed the entirety thereof to mortgagees in fee. In 1818, M., the descendant of H., the other coparcener, suffered a recovery of the other moiety, which it was declared should enure (subject to the trusts of a term) to the use of W.'s mortgagees: *Held*, by the Lords affirming a judgment of the Court of Exchequer Chamber, 1st, that the deed poll of 1735 operated as a covenant to stand seised, and created a base fee, determinable by the entry of the issue in tail: 2d, That this base fee did not, on the widow's death, become merged in the reversion in fee in G., as the estate tail subsisted as an intermediate estate: 3d, That, although G. being estopped by the recovery suffered by him, was not remitted to the estate tail, no right of entry accrued to any one until his death, and therefore the period of twenty years, for the operation of the Statute of Limitations against the issue in tail, was to be calculated from his death, and not from the death of his mother; and consequently, that W.'s entry (in 1790) was not barred by lapse of time: 4th, That, although W. entered under the will, and manifested *an intention to take the *946 estate under it for his life only, his doing so was immaterial, and he was remitted, as to his moiety, to the original estate tail, which was barred by the recovery in 1818: and fifthly, That the entry and remitter of W. did not operate to remit his coparcener M. to the other moiety of the estate. — *Doe d. Daniel v. Woodroffe*, 811.

RETROSPECTIVE RATE. See RATE.

SALE OF ESTATE UNDER DECREE.

1. Upon a bill filed by a remainder-man in tail, to set aside a sale of lands, made nearly fifty years before under a decree in a suit by a judgment creditor, to carry the trusts of a will into execution, and for the administration of the testator's estate, on the ground of irregularities and error in the proceedings, and fraud in the sale: *Held*, by the Lords, affirming the decree complained of, that, in the absence of proof of fraud on the part of the purchaser, or that the estate was sold under the value by reason of any corrupt bargain, the sale was not impeachable. — *Bowen v. Evans*, 257.
2. A purchaser under a decree, not impeachable when made, cannot become so from any irregularities in the subsequent conduct of the cause, or errors in dealing with the purchase money. — *Id. ib.*
3. After a long lapse of time since the transactions complained of, there having been parties *in esse* competent to impeach them, fraud is not to be assumed on doubtful evidence; but if it be clearly proved, no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of a Court of Equity; and in that case, it is immaterial by what machinery or contrivance the fraudulent transaction may have been effected, whether by a decree in equity, or judgment at law, or otherwise. But in proportion as such jurisdiction is powerful, so ought

the caution of the Court to be anxiously exercised, lest in its zeal to do equity, the reverse may be effected. — *Id. ib.*

* 947 * SALE OF GOODS.

The giving of a delivery order does not, without some positive act done under it, operate as a constructive delivery of the goods to which it relates, nor deprive the owner of the goods, who gave it, of his right of lien for their price, even as against the claims of a third person, who has *bonâ fide* purchased them from the original vendee. S., the owner of sugars, sold them to B., to whom he gave a delivery order, addressed to his agent A. and took a bill of exchange in payment of the price. B. sold the sugars to M., and transferred to him the delivery order. The sugars were in the warehouse of L., in whose books they were entered as received by him, "from A., on account of S." The sugars were weighed and invoiced by A., upon the order of S. Neither B. nor M. took any steps to act on the delivery order, till a rumour arose of B.'s insolvency, when M. presented the order to A., and received from him a fresh order, addressed to L., the warehouse keeper. Before the sugars could be actually delivered under this order, A. removed them under the direction of S.: *Held*, affirming the judgment of the Court below, that the possession of the goods had never been changed, and that S. might still enforce upon them his lien as vendor. — *M'Ewan v. Smith*, 309.

SATISFACTION OF DEBT OR LEGACY.

There is a distinction between satisfaction of debts, and of a portion, by legacy. Equity leans against satisfaction of debt by legacy, but in favour of a provision by will, being in satisfaction of a portion by contract. Small differences between the debt and the legacy negative the presumption of satisfaction, but are disregarded in the case of portions. So in case of debt, a smaller legacy is not a satisfaction of a larger debt, but may be satisfaction of a portion *pro tanto*. A gift of residue cannot be a satisfaction of a debt, because, * the amount being uncertain, it may be less than the debt; but as a portion may be satisfied by a smaller legacy *pro tanto*, so, on principle, a residue ought to be considered as satisfaction of a portion altogether, or, *pro tanto*, according to the amount. — *Lady E. Thynne v. Earl of Glengall*, 154.

SEPARATE ESTATE OF WIFE,

How affected by joining in security with her husband. — See MORTGAGE.
SET OFF.

Innes, consignee of a West India estate, was appointed trustee thereof by B., the tenant for life, for the purpose of keeping down encumbrances. Innes was also private agent and banker for B., with the understanding that B. was not, nor were his funds, to be liable for advances made by Innes for the estate; Innes becoming embarrassed, was declared bankrupt, and assignees were appointed: *Held*, by the Lords, — reversing orders of the Court of Chancery, on a bill filed by B. and the other owners of the estate, to remove Innes from the possession and management, that a sum found due from Innes to B., on their private dealings, might be set off against a sum found due to Innes in respect of his advances and payments for the estate. — *Baillie v. Edwards*, 74.

SETTLEMENT, CONSTRUCTION OF. See **LIMITATION. POWER. WILL. SHIP.** See **FREIGHT. INSURANCE.**

SOVEREIGN. See **JURISDICTION.**

SPECIFIC DAMAGES. See **AGREEMENT, 2.**

STAMP.

Where a paper purports to be a receipt, and, as such, requires a stamp, but also purports to be an agreed statement of accounts, which does not require a stamp, it may be given in evidence to show the agreed state of accounts only, though it has not been previously stamped. Its admissibility under such circumstances * is restricted to this extent: so far as it * 949 relates simply to prove the statement of account, and is not produced for the purpose of proving the receipt of money. It cannot be used for the purpose of proving the receipt of money in any way. If a document which is unstamped, but requires a stamp, is offered in evidence, and if stamped, would be evidence to establish any point litigated between the parties, it cannot be received. If it would be of no benefit when stamped, it may, though unstamped, be received in evidence. In an action for work and labour, there was tendered in evidence a paper containing a statement of accounts, which declared a balance of 68*l.* 9*s.* 4*d.*, and at the end was an acknowledgment of the payment of that sum. In an action for work and labour this paper was offered in evidence by the defendant, not for the purpose of proving that the sum of 68*l.* 9*s.* 4*d.* had been paid, for that was not in contest between the parties, but in order to show what was the admitted state of accounts at a particular time: *Held* (reversing an interlocutor of the Court of Session), that it was admissible for that purpose. — *Matheson v. Ross*, 286.

STOPPAGE IN TRANSITU. See **DELIVERY ORDER.**

TACKING SECURITIES. See **MORTGAGE.**

TREASON. See **ATTAINDER. PLEADING. PRACTICE.**

An indictment, charging a prisoner in Ireland with compassing, &c. to excite insurrection there, and to levy war, and to put the Queen to death, and charging, as overt acts, assembling with others, armed with weapons, to excite insurrection and to levy war, is not an indictment founded on the 57 Geo. III. c. 6, so as to entitle the prisoner, under the Statutes 7 & 8 W. III. c. 3, and 7 Anne, c. 21, to a copy of the indictment, and to a list of witnesses, to be delivered ten days before the trial. The 4th section of the 57 Geo. III. c. 6, extends only to treasons made or declared by that statute. *Quære*, whether the objection for the want * of such copy * 950 and list is to be raised by plea on arraignment. The offence of levying war against the King, declared by the 25 Edw. III. stat. 5, c. 2, is high treason in Ireland by the effect of the Irish Statute 10 Hen. VII. c. 22, commonly called Poyning's Act, by which, acts which were treason in England under the statute of Edw. III. were made treason in Ireland. — *O'Brien v. The Queen*, 465.

TRUSTEES. See **EQUITY. PRACTICE.** "PROTESTANT DISSENTERS."
TRUSTS.

1. *Seemle*, that neither bankruptcy nor occasional residence abroad disqualifies a testamentary trustee to whom the testator has unconditionally

confided a large personal discretion in the administration of the trust, together with a power to appoint a receiver of the rents of the trust estate. — *Archbold v. The Commissioners of Charitable Bequests for Ireland*, 440.

2. In 1825 Henry Wyatt and his son Henry E., who had previously carried on business as brewers, admitted another son, George, into partnership. By the partnership deed, it was agreed that the plant, &c. which was stated to have been valued at 63,000*l.*, exclusive of the stock and debts, should be the capital, to a moiety of which the father was to be entitled. His surplus monies in the business were stated to amount to 48,915*l.*, on which he was to receive interest. He died in July, 1826, having, by his will, given his surplus capital to his executors, in trust to invest the same in government or other security, and pay the income to his wife, and after her death to set apart two legacies of 12,000*l.* each for his two daughters and their children. He gave his interest in the business and the stipulated ordinary capital to his sons Henry E., George, and William, the last of whom was a minor, and he directed his executors to carry on the business

- * 951 in conjunction with his two sons, until William *attained twenty-one, and he empowered them to sell his share in the brewery during his minority. He charged his freehold and other property with the payment of his surplus capital, and directed mortgages of his real estate for securing the legacies. The will was not proved till December, 1827, the executors having in the mean time left the surviving partners in the undisturbed possession of the partnership property; and the business, although they did not take any active part in it, was carried on with their concurrence. Disputes having arisen between the surviving partners, the adult legatees filed a bill in 1827 for administration, which, through the interference of the executors, was abandoned. In 1828 the executors joined in deeds whereby the partnership was dissolved, and Henry E. assigned his interest to George, in consideration of 20,000*l.*, and the executors released Henry E. from all claims in respect of any surplus capital. The business, which was afterwards sold with the sanction of the Court, was found to be insolvent, and the partnership property turned out to be wholly unproductive to the testator's estate. The executors then filed a bill for administration of the estate; and in January, 1831, a bill was filed by the children of the testator's two daughters, seeking to charge the executors with wilful default in not having obtained payment of the legacies out of the surplus capital. By several decretal orders, made in both causes, accounts were directed to be taken as to the accuracy of the recitals in the partnership deed, the value of the plant, and the surplus money due to the testator at his death; and accounts were directed to be taken of the partnership dealings and transactions; and if the Master should find that he was unable to take such accounts, by reason of the non-production of books of account, he was to state the circumstances. The Master, having reported
- * 952 that he could not take the accounts for non-production of * books, he was, by another order, directed further to inquire by whom the partnership property was possessed at the death of the testator, and how disposed of, and whether the executors, with due diligence, and without their wilful default, might have possessed themselves, out of the partnership property,

of sufficient to pay the two legacies of 12,000*l*. The Master again reported that he was unable to take the accounts, by reason of the non-production of the books; he found, however, on the evidence before him, large sums to have been due to the testator at his death, and large partnership assets, and that the executors might, with due diligence, and without their wilful default, have possessed themselves out of the partnership property, of a sufficient sum to pay the two legacies. The Court, upon exceptions, negatived the finding of wilful default: *Held*, by the House of Lords, that there was no reason for thinking that the surplus capital could, if at all, have been realized, without putting an end to the business, which the executors could not do without breach of their duty; That though the executors had not properly performed their duty, still, as it had not been satisfactorily made out that there ever were partnership assets, out of which the legacies could have been recovered or secured, the executors ought not to be charged with wilful default. — *Rowley v. Adams*, 725.

3. Executors are not chargeable with the value of their testator's property, as stated by himself and others in deeds to which the executors are not parties. — *Id. ib.*
4. Although contemporaneous usage and long enjoyment afford grounds for the interpretation of doubtful words in a trust deed, they give no sanction to a breach of trust. — *Drummond v. The Attorney-General for Ireland*, 837.
5. A decree which declares Trinitarian Protestant Dissenters alone to be entitled to a trust fund, is right in removing * from the trust * 953 such of them as concurred in the misapplication of the fund, by allowing Unitarian Protestant Dissenters to administer it with them. — *Drummond v. The Attorney-General for Ireland*, 837.

UNITARIANS. See PROTESTANT DISSENTERS.

VENDOR'S LIEN. See LIEN.

VESTING. See WILL, 2.

WILL.

R. P. being entitled to one-third share of real and personal estates, settled such share upon her marriage with power of appointment to herself (in events that happened), over one-third part thereof by deed or will, and over the other two-third parts by will, subject to the husband's life interest therein, and in default of issue of the marriage. R. P. becoming entitled to a moiety of another third share of the same estates, settled to such uses as she should appoint, subject to the husband's life interest. There was one child of the marriage. R. P. by her will devised, bequeathed, and appointed "all that one-third part of her real and personal estates, over which she had a disposing power," upon trust, immediately after her death, to raise a sum of 500*l*.; and "as to the residue of the said one-third part, and the remaining two-third parts," she gave the same to her husband for life, remainder to her infant son and his heirs; but in case he should die under twenty-one without issue, she directed the residue of the said one-third part to be sold, for payment of an annuity and legacies given by her will — the annuity to be payable upon the son's death, and the legacies as soon as the said one-third part could be sold; and as to

- the remaining two-third parts, subject to her husband's life interest, she gave and appointed them to her sister absolutely. The son survived the testatrix, and died under twenty-one without issue. *Held*, that the appointment of the "one-third part" for payment of the annuity and legacies extended only to one ninth of R. P.'s original third share,
- * 954 and to one third of the * moiety of the other third share; that the annuity and legacies became payable at the death of the son, with interest on the legacies from that time; that the will did not affect the husband's rights under the settlement, and no case of election was raised against him. — *Saward v. M'Donnell*, 88.

A testatrix gave to the eldest son of her daughter Eliza and of her husband E. L., who should be living at the time of her decease, ten guineas, adding that she left him no larger sum because he would have a handsome provision from the estate of her late husband and of his own father (who was still alive): And she gave the residue of her property to her executors, upon trust, as to one moiety thereof, to pay and divide the same unto and amongst all the children of her daughter Eliza, who were then in being or should be thereafter born, — except her eldest son, or such of her sons as should, by the death of an elder brother, become an eldest son, — equally to be divided amongst them, and the survivors or survivor, when the youngest should arrive at the age of twenty-one years. At the death of the testatrix, her daughter Eliza had five children, and the eldest son was provided for from the estates in the will mentioned, and he received the ten guineas, but died, without issue, before the youngest child attained twenty-one. The second, who then became an eldest son, did not succeed to the provisions which had been made for an eldest son. *Held*, notwithstanding, that he, being the eldest son at the time the youngest of the children attained twenty-one, was excluded from any share in the moiety of the residue. — *Livesey v. Livesey*, 419.

WINDING-UP ACTS.

- The mere fact of a person being a member of the provisional committee of a joint stock company does not make him liable as a "contributory" within the Winding-up Acts. C. consented to have his name inserted * in the list of provisional committee-men of a proposed railway company, which was provisionally registered; and the name was accordingly inserted and advertised; he did not accept or apply for shares, or attend any meeting of the committee. The undertaking was afterwards abandoned. *Held*, that C. incurred no liability to contribute towards payment of the debts of the company, and was not a "contributory" within the Winding-up Acts. — *Norris v. Cottle*, 647.
2. If a person whose name is on the provisional committee of a joint stock company, provisionally registered, "accept" shares in the company, although he does not pay the deposits, he is a contributory within the Winding-up Acts. U.'s name was on the list of the provisional committee contained in a published prospectus of a railway company, provisionally registered, and in answer to a letter from the secretary, informing him that the committee of management had apportioned one hundred shares in the company to each provisional committee-man, and

desiring to be informed whether he would take them; he wrote a letter saying, "I accept the one hundred shares allotted me." The secretary afterwards sent him a letter of allotment "not transferable," stating that the committee of management had allotted to him one hundred shares, and requesting him to pay the deposits thereon into one of the company's banks on or before a certain day, "or the allotment would be null and void." U. paid no deposits, and did no other act in connection with the company. The undertaking, having failed for want of capital, was abandoned: *Held*, that the two first formed a complete contract, exclusive of the third; and that U. was a contributory within the Winding-up Acts, 1848 and 1849. — *Hutton v. Upfill*, 674.

WITNESS. See EVIDENCE, 5, 6. TREASON.

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which, being proved, are grounds for a decree, the proper course is to dismiss so much of the bill as is not proved, and to give as much relief, under the circumstances, as the plaintiff may be entitled to. — *Archbold v. Commissioners of Bequests for Ireland*, 440.

3. An allegation upon a record that three Judges executed a commission in relation to the trials of prisoners, to try whom that commission was issued, is an affirmative allegation of their authority to perform that duty, and is not rendered uncertain by a subsequent statement that the commission was directed to them and others. — *O'Brien v. The Queen*, 465.
4. *Quare*, whether an objection for the want of a copy of an indictment for treason, and of a list of the Crown's witnesses, to which the prisoner is declared entitled by the statutes relating to treason in Ireland, is to be raised by plea on arraignment. — *Id. ib.*
5. An *allocutus*, whether "the justices and commissioners ought not on the premises and verdict aforesaid to proceed to judgment" against the prisoner, is sufficient. The form "judgment of death," or "judgment to die," is surplusage. — *Id. ib.*
6. Under a declaration for a total loss of freight, a partial loss of freight may be recovered. — *Benson v. Chapman*, 696.

POWER OF APPOINTMENT.

- R. P., being entitled to one-third share of real and personal estates, settled such share upon her marriage, with power of appointment to herself (in
- * 941 events that * happened) over one-third part thereof, by deed or will, and over the other two-third parts by will, subject to the husband's life interest therein, and in default of issue of the marriage. R. P. becoming entitled to a moiety of another third share of the same estates, settled it to such uses as she should appoint, subject to the husband's life interest. There was one child of the marriage. R. P. by her will devised, bequeathed, and appointed "all that one-third part of her real and personal estates, over which she had a disposing power," upon trust, immediately after her death to raise a sum of 500*l.*; and "as to the residue of the said one-third part, and the remaining two-third parts," she gave the same to her husband for life, remainder to her infant son, and his heirs; but in case he should die under twenty-one, without issue, she directed the residue of the said one-third part to be sold, for payment of an annuity and legacies given by her will, — the annuity to be payable upon the son's death, and the legacies as soon as the said one-third part could be sold; and as to the remaining two-third parts, subject to her husband's life interest, she gave and appointed them to her sister absolutely. The son survived the testatrix, and died under twenty-one without issue: *Held*, that the appointment of the "one-third part" for payment of the annuity and legacies, extended only to one ninth of R. P.'s original third share, and to one third of her moiety of the other third share. 2. That the annuity and legacies became payable on the death of the son, with interest on the legacies from that time. 3. That the will did not affect the husband's rights under the settlements, and no case of election was raised against him. — *Saward v. M'Donnell*, 88.

PRACTICE. See CHARITIES. ERROR.

1. The House will not grant the costs of an appeal to come out of the estate, upon a mere miscarriage of the Court below, where the subject of litigation, though in * the result decided by the Court, was one which * 942 might have required to be tried as a question of fact. — *Piers v. Piers*, 331.
2. The House strongly condemned the custom of each party printing an Appendix to his case, and desired that, in future, a joint Appendix might alone be printed. — *Id. ib.*
3. The circumstance that a person has been made a party to a suit in the Court below, if improperly so made, will not entitle him to appeal to this House against a decree made in that suit. — *Rochfort v. Battersby*, 338.
4. Where it appeared to the House that a mistake committed by an officer of the Court below in entering the judgment of that Court was made the ground of a writ of error, the arguments on the writ of error brought on such judgment were stopped, and the case was ordered to stand over, to allow the parties to apply to the Court below to amend the error. The House made this order, after referring to the report of the opinions of the Judges of the Court below, as stated in the printed reports of the decisions of that Court. — *Gregory v. The Duke of Brunswick*, 415.
5. If a bill alleges fraud, which is not proved, and also alleges other matters, which, being proved, are grounds for a decree, the proper course is to dismiss so much of the bill as is not proved, and to give so much relief under the circumstances as the plaintiff may be entitled to. — *Archbold v. Commissioners of Bequests for Ireland*, 440.
6. An *allocutus*, whether "the justices and commissioners ought not, on the premises and verdict aforesaid, to proceed to judgment" against the prisoner, is sufficient. The form "judgment of death," or "judgment to die," is surplusage. — *O'Brien v. The Queen*, 465.
7. Two actions were brought in Scotland, both arising out of the same cause. They were conjoined. The * Lord Ordinary pronounced a * 942 judgment, which, in point of form, applied to one only, but which, in substance, affected both. His judgment was appealed against to the Court of Session, which made a decree, disposing in form as well as substance, of both actions: *Held*, that a decree, so made, was correct. — *Burnes v. Pennell*, 497.
8. The officers of state in Scotland obtained a judgment on interdict against an individual who had, by erecting a wall, encroached on the sea-shore, the suit being instituted by them solely to protect the public right. The judgment of the Court below was appealed against and affirmed, but was affirmed without costs. — *Smith v. The Earl of Stair and the Officers of State in Scotland*, 807.
9. A decree which declares Trinitarian Protestant Dissenters alone to be entitled to a trust fund, is right in removing from the trust such of them as concurred in the misapplication of the fund, by allowing Unitarian Protestant Dissenters to administer it with them. — *Drummond v. The Attorney-General of Ireland*, 837.

PRESUMPTION. See EVIDENCE, 2.

PRINCIPAL AND AGENT. See **AGENT.**

The relation between a banker and a customer, who pays money into the bank, is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the customer's drafts; and that relation is not altered by an agreement by the banker to allow the interest on the balances in the bank. The relation of banker and customer does not partake of a fiduciary character, nor bear analogy to the relation between principal and factor or agent, who is quasi trustee for the principal in respect of the particular matter for which he is appointed factor or agent. *Held*, therefore, that an account between bankers and their customer, not long nor complicated, but consisting of a few items and interest, * is not a fit subject for a bill in equity. — *Foley v. Hill*, 28.

"PROTESTANT DISSENTERS." See **EVIDENCE**, 7.

In the year 1710, certain members of Protestant Dissenting congregations in Ireland subscribed sums of money for charitable purposes, and for the management of the fund executed a deed, which recited that the objects of the trusts thereof were — 1st, To support the Protestant Dissenting interest against unreasonable prosecutions: 2d, To educate youth designed for the ministry among Protestant Dissenters: 3d, To assist poor Protestant Dissenting congregations: and 4th, For such other pious and religious ends and by such means as the subscribers should think proper for promoting these objects: *Held*, affirming the judgment of the Court of Chancery in Ireland, that Unitarian Protestant Dissenters were not within the trusts of this deed. — *Drummond v. The Attorney-General*, 837.

PURCHASE. See **SALE.****RATE.**

There is no rule of law which prohibits a retrospective rate. In every case of rating the question is, whether the Act under which a rate is made, either expressly or impliedly, prohibits such rate from being retrospective. The 2 Wm. IV. c. 50 (public local) for draining the lands of Holderness, in the East Riding of the county of York, contains no prohibition against a retrospective rate. The commissioner under that Act borrowed money (on which interest became due), for the purposes of the works directed by the Act: *Held*, that a rate made to pay off the debt thus incurred was, under the provisions of that Act, a valid rate. — *Harrison v. Stickney*, 108.

RECEIPT. See **STAMP.****RECORDER.** See **CORPORATION.****REGISTERS.** See **EVIDENCE.****REMITTER.**

An estate being limited to the use of A. and his wife, and the heirs of their bodies, with remainder to A. in * fee, and A. having died, leaving his widow, and G. an only son, and L. and H. only daughters, the widow, in 1735, by deed poll, in consideration of an annuity granted to her by G., and of natural affection, "granted, surrendered, and yielded up" the estate to him in fee; and he afterwards, during her life, suffered a recovery. She died in 1767. G. died, without issue, in 1779, having devised the estate to trustees, to secure an annuity to B., the only son of his sister

L., (then dead), and subject thereto to W., eldest son of B., for his life, with remainder to B.'s second son. In 1790, W., on his father's death, entered into possession of the whole estate, claiming under the will of G., and subsequently did various acts in the character of devisee for life. In 1814 he suffered a recovery of one moiety of the estate, and in 1816 conveyed the entirety thereof to mortgagees in fee. In 1818, M., the descendant of H., the other coparcener, suffered a recovery of the other moiety, which it was declared should enure (subject to the trusts of a term) to the use of W.'s mortgagees: *Held*, by the Lords affirming a judgment of the Court of Exchequer Chamber, 1st, that the deed poll of 1735 operated as a covenant to stand seised, and created a base fee, determinable by the entry of the issue in tail: 2d, That this base fee did not, on the widow's death, become merged in the reversion in fee in G., as the estate tail subsisted as an intermediate estate: 3d, That, although G. being estopped by the recovery suffered by him, was not remitted to the estate tail, no right of entry accrued to any one until his death, and therefore the period of twenty years, for the operation of the Statute of Limitations against the issue in tail, was to be calculated from his death, and not from the death of his mother; and consequently, that W.'s entry (in 1790) was not barred by lapse of time: 4th, That, although W. entered under the will, and manifested *an intention to take the * 946 estate under it for his life only, his doing so was immaterial, and he was remitted, as to his moiety, to the original estate tail, which was barred by the recovery in 1818: and fifthly, That the entry and remitter of W. did not operate to remit his coparcener M. to the other moiety of the estate. — *Doe d. Daniel v. Woodroffe*, 811.

RETROSPECTIVE RATE. See RATE.

SALE OF ESTATE UNDER DECREE.

1. Upon a bill filed by a remainder-man in tail, to set aside a sale of lands, made nearly fifty years before under a decree in a suit by a judgment creditor, to carry the trusts of a will into execution, and for the administration of the testator's estate, on the ground of irregularities and error in the proceedings, and fraud in the sale: *Held*, by the Lords, affirming the decree complained of, that, in the absence of proof of fraud on the part of the purchaser, or that the estate was sold under the value by reason of any corrupt bargain, the sale was not impeachable. — *Bowen v. Evans*, 257.
2. A purchaser under a decree, not impeachable when made, cannot become so from any irregularities in the subsequent conduct of the cause, or errors in dealing with the purchase money. — *Id. ib.*
3. After a long lapse of time since the transactions complained of, there having been parties in *esse* competent to impeach them, fraud is not to be assumed on doubtful evidence; but if it be clearly proved, no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of a Court of Equity; and in that case, it is immaterial by what machinery or contrivance the fraudulent transaction may have been effected, whether by a decree in equity, or judgment at law, or otherwise. But in proportion as such jurisdiction is powerful, so ought

the caution of the Court to be anxiously exercised, lest in its zeal to do equity, the reverse may be effected. — *Id. ib.*

* 947 * SALE OF GOODS.

The giving of a delivery order does not, without some positive act done under it, operate as a constructive delivery of the goods to which it relates, nor deprive the owner of the goods, who gave it, of his right of lien for their price, even as against the claims of a third person, who has *bonâ fide* purchased them from the original vendee. S., the owner of sugars, sold them to B., to whom he gave a delivery order, addressed to his agent A. and took a bill of exchange in payment of the price. B. sold the sugars to M., and transferred to him the delivery order. The sugars were in the warehouse of L., in whose books they were entered as received by him, "from A., on account of S." The sugars were weighed and invoiced by A., upon the order of S. Neither B. nor M. took any steps to act on the delivery order, till a rumour arose of B.'s insolvency, when M. presented the order to A., and received from him a fresh order, addressed to L., the warehouse keeper. Before the sugars could be actually delivered under this order, A. removed them under the direction of S.: *Held*, affirming the judgment of the Court below, that the possession of the goods had never been changed, and that S. might still enforce upon them his lien as vendor. — *McEwan v. Smith*, 309.

SATISFACTION OF DEBT OR LEGACY.

There is a distinction between satisfaction of debts, and of a portion, by legacy. Equity leans against satisfaction of debt by legacy, but in favour of a provision by will, being in satisfaction of a portion by contract. Small differences between the debt and the legacy negative the presumption of satisfaction, but are disregarded in the case of portions. So in case of debt, a smaller legacy is not a satisfaction of a larger debt, but may be satisfaction of a portion *pro tanto*. A gift of residue cannot be a

* 948 satisfaction of a debt, because, * the amount being uncertain, it may be less than the debt; but as a portion may be satisfied by a smaller legacy *pro tanto*, so, on principle, a residue ought to be considered as satisfaction of a portion altogether, or, *pro tanto*, according to the amount. — *Lady E. Thynne v. Earl of Glengall*, 154.

SEPARATE ESTATE OF WIFE,

How affected by joining in security with her husband. — See MORTGAGE.

SET OFF.

Innes, consignee of a West India estate, was appointed trustee thereof by B., the tenant for life, for the purpose of keeping down encumbrances. Innes was also private agent and banker for B., with the understanding that B. was not, nor were his funds, to be liable for advances made by Innes for the estate; Innes becoming embarrassed, was declared bankrupt, and assignees were appointed: *Held*, by the Lords, — reversing orders of the Court of Chancery, on a bill filed by B. and the other owners of the estate, to remove Innes from the possession and management, that a sum found due from Innes to B., on their private dealings, might be set off against a sum found due to Innes in respect of his advances and payments for the estate. — *Baillie v. Edwards*, 74.